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February 10, 2003

Federal Communications Commission
Attn: Michael K. Powell, FCC Chairman
445 12th Street S.W.
Washington, D.C. 20554

Re: Revised Reply Comments of Mediacom Communications Corporation

Dear Mr. Powell:

Please find attached Revised Reply Comments of Mediacom Communications Corporation. The original Reply Comments of Mediacom Communications Corporation were filed on February 4, 2003.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

/s/ Trina R. LeRiche
Trina R. LeRiche

TRL/lsc
Attached

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of)	
)	
2002 Biennial Regulatory Review—Review of the)	
Commission’s Broadcast Ownership Rules and)	MB Docket No. 02-277
Other Rules Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	
Ownership of Radio Broadcast Stations)	MM Docket No. 01-317
in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

**REVISED REPLY COMMENTS OF
MEDIACOM COMMUNICATIONS CORPORATION**

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February 10, 2003

SUMMARY

Since acquiring its first cable system in 1996, Mediacom Communications Corporation (“Mediacom”) has grown to become the eighth largest multiple system operator (“MSO”). It occupies a unique place in the industry because it was created for the purpose of acquiring and upgrading underserved cable systems in small to mid-sized markets. It also is focused entirely on operating its cable systems, since it is one of the few MSOs of its size or larger that does not own programming interests.

Mediacom has spent hundreds of millions of dollars on its acquired systems to upgrade them to state-of-the-art cable networks in order to offer consumers in the 1,500 small and mid-sized communities it serves cable television service that rivals that offered in the larger metropolitan markets, as well as advanced broadband services like digital cable, video-on-demand, high definition television, and high-speed Internet access. Mediacom has successfully bridged the “digital divide” that might have continued to disadvantage the communities it serves if its systems had remained in the hands of the industry giants, who long ago shifted their attention and resources to systems clustered in the major metropolitan markets.

The media industry has changed tremendously since 1996 and is now dominated by six huge, vertically integrated conglomerates whose reach and market power extend to virtually all media segments. They own all six of the broadcast television networks, as well as the largest radio networks, scores of local television and radio stations, major motion picture and television program production and distribution properties, magazine and book publishing units and record companies. They also own or have interests in approximately 153 cable networks, including 30 of the 36 top-rated advertising-supported basic cable networks. There is cross-ownership between some of the six companies, and each has one or more cable programming joint ventures with one or more of the others. The vast resources, reach and market power of these media giants and their control over popular

prime-time broadcast television programs coupled with their rights as broadcast station owners under the must-carry/retransmission consent rules give them tremendous leverage in negotiating with cable companies for carriage of their cable networks.

At the same time as this concentration has been occurring, direct broadcast satellite (“DBS”) has emerged as an effective competitor to cable. DBS subscribers now represent over 20% of all multichannel video programming distributors’ (“MVPD”) subscribers and DBS is expected to continue to grow at a rapid pace, while cable’s market share correspondingly declines. The two national DBS companies are significantly larger than Mediacom, and simply dwarf the average independent small cable system operator. Due to their size, financial resources, lower programming costs and freedom from franchise fee and local property tax obligations and governmental regulations that apply to cable companies, the DBS companies enjoy structural cost advantages over smaller and independent cable companies. Competition from DBS has added immeasurably to the programmers’ market power because if a cable operator drops a network it views as being too expensive for the majority of its customers, subscribers who assign it a high value will switch to DBS. Cable networks, which owe their very existence to the cable industry, have forgotten their roots and now actually support efforts of DBS providers to lure those subscribers away from cable.

Their tremendous market power permits the six media giants to engage in practices, discussed at length in these comments, that are contrary to the public policy goals of promoting competition, diversity of viewpoints and localism.

One direct result has been sharply higher prices paid by cable companies for programming. The rates for many of the popular networks are not only high, but increase annually at rates far in excess of inflation. That means high and constantly increasing bills for cable customers. Because of the programmers’ power, many of the decisions about what programming packages and options will be offered to subscribers are now made at the national headquarters of the six media conglomerates, rather than by the local managers of

cable systems who live in the communities they serve and who are sensitive to the differing local needs and preferences of their customers. Programmers tie carriage of their weak networks to the grant of licenses for their popular networks. They force cable operators to carry services on the expanded basic tier, and then structure their pricing schemes so that the cable company is forced to pay higher rates if a certain number of its customers choose not to subscribe to the service. They refuse to permit cable operators to offer the most expensive networks on an a la carte basis so that subscribers can decide for themselves whether those networks are worth the price.

Rate increases and the refusal to allow local cable systems and their customers freedom of programming choice have been a lightning rod for consumer complaints. Many consumers do not understand that programming costs are the single greatest factor behind rising cable rates or that it is the bundling and other practices of programmers that force subscribers to buy unwanted channels. Programmers require cable companies to keep the terms of their affiliation agreements secret to ensure that it is the cable operator, not the programmer, who bears the burden of customer complaints.

Mediacom is one of the most financially sound cable companies in the industry and expects to continue to provide first-rate service to its subscribers while delivering sufficient returns to its investors to attract the capital it needs for that purpose. However, high and rapidly growing programming costs mean the diversion of financial resources that otherwise could be used for even greater service improvements and additions or for acquiring and upgrading systems in other underserved markets. On the other hand, many of the hundreds of smaller independent cable companies serving rural and small town America who lack Mediacom's financial strength are in danger of having to close their doors or selling out to bigger MSOs, with resulting harm to the goals of competition, diversity and localism.

Just as important, consumers are hurt, since the portion of the costs that cable companies cannot prudently absorb must be passed on to subscribers. Mediacom's customers in Albany, Georgia, Clear Lake, Iowa, Moline, Illinois, Springfield, Missouri, and

its other franchise areas do not have discretionary incomes that match those of subscribers in the big cities. They cannot easily afford the rate increases we would have to institute if programming costs, especially for sports, continue to grow as they have during the past several years. The volume discounting and other practices of cable networks also have resulted in price discrimination. Consumers in one town, city or state should not pay a different price for a cable network than consumers in another town, city or state where the difference is not cost-based, but that is exactly what happens because of the market power and practices of the media conglomerates.

There are many reasonably priced cable networks that offer value commensurate with their cost, and they are also hurt by the practices of programmers controlled by the media giants because cable companies are left with less money and channel space for their services.

Mediacom believes that past relaxation of structural limits on ownership and cross-ownership have significantly contributed to the growth of the six media conglomerates and their market power. Relaxing or eliminating the limit on broadcast station ownership would undoubtedly lead to a flurry of acquisitions of even more local broadcast stations by some or all of those companies, thereby adding significantly to their already excessive market power. Each arm of each of the conglomerates adds to its overall strength, since their common strategy and practice is to leverage each of their properties to maximum advantage of the overall company. If relaxation of the broadcast station ownership limit adds to the power of one of the six huge, vertically integrated conglomerates in the broadcast television market, then that added clout will be applied in the market for cable programming.

If the Commission does see fit to eliminate or relax the broadcast station limit, then Mediacom believes that it should condition the right of any of the six dominant media companies to acquire new or additional broadcast stations upon its conformity with the following principles:

- The net effective rates for cable networks owned by affiliated companies should be the same for all MVPDs, regardless of distribution technology, size or market characteristics unless the differentials are cost based.
- Cable systems should have the right to offer on an a la carte basis those networks for which the license fee is more than twice the average per-channel cost of the same tier of service.
- Broadcasters that are vertically integrated with owners of cable networks should be required to elect must-carry, rather than retransmission consent.
- Affiliated programmers should be prohibited from tying or bundling cable networks, either overtly or through pricing schemes that make individual carriage uneconomic.
- In the interest of assuring the availability of critical information that is essential to a “properly functioning market,” affiliated programmers should be required to stop using confidentiality provisions to protect disclosure of rates and terms, waive existing confidentiality clauses and disclose the net effective rates that the various MSOs and the DBS companies actually pay, as well as other material contract terms.

Requiring observance of these principles would serve the interests of the public policy goals of competition, diversity and localism and also further the goal of ensuring that all citizens, regardless of where they live, have access to video programming on a non-discriminatory basis.

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REVISED REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

Mediacom Communications Corporation ("Mediacom"), through its attorneys, and in conformance with Section 1.415 of the Commission's Rules,¹ is submitting these comments in response to the issues raised in the Commission's Notice of Proposed Rulemaking² and in reply to comments made by others in the initial round of comments.

The media industry has become concentrated in the hands of a few large companies, principally six vertically integrated conglomerates that have interests in a variety of production and distribution properties. Mediacom believes that past loosening or removal of

¹ 47 C.F.R. § 1.415 (2001).

² *In the matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 02-249 (rel. Sept. 23, 2002) ("Notice").

several structural limitations on ownership and cross-ownership have significantly contributed to the growth of those conglomerates.

As the leading multiple cable television system operator (“MSO”) primarily focused on small and mid-sized markets, Mediacom has first-hand knowledge of the consequences of the concentration of enormous power in the six media conglomerates, who now own or have interests in most basic cable networks. As explained in detail in these comments, that power has been used to the detriment of the citizens of the approximately 1,500 communities in twenty-three states who rely on Mediacom’s locally managed cable systems for television programming and advanced broadband services. While these comments are being filed solely on behalf of Mediacom, we believe that our experience has been shared by the other members of the American Cable Association (“ACA”), an industry association representing around 930 independent cable system operators in the federal legislative and regulatory process. The ACA’s members collectively serve 7.5 million cable subscribers, primarily in smaller markets and rural areas.³ ACA member systems are located in all fifty states, and they range from family-run cable businesses serving a single town to multiple system operators that focus on smaller markets.⁴ The average ACA member company serves 8,000 subscribers, and about half of ACA’s members serve fewer than 1,000 subscribers.⁵

The media conglomerates already use their leverage deriving from their enormous financial resources and their ownership of local broadcast stations and cable networks to the detriment of the consumers served by Mediacom and other small-market cable companies, as well as independent programming producers. Among other consequences, the concentration of the media industry has directly contributed to or resulted in:

³ See Petition to Deny of American Cable Association, *In re Consolidated Application of EchoStar Communications Corporation, General Motors Corporation, Hughes Electronic Corporation For Consent to Transfer Control*, CS Docket No. 01-348 (filed Feb. 4, 2002), at 1, 3 (“ACA Petition”).

⁴ *Id.* at 3.

⁵ *Id.*

- Rising cable rates, as the six media giants who control cable programming in America force small cable operators to enter into long-term contractual obligations with unfair and discriminatory terms, including annual rate increases for cable programming of two to eight times the rate of inflation.
- Price discrimination against citizens living in rural and small markets because these media conglomerates generally charge lower programming rates to the bigger cable operators that serve the larger metropolitan markets.
- Reduction in the ability of independent, non-vertically-integrated cable companies, to effectively compete against the two national direct broadcast satellite (“DBS”) service providers because the cable networks that the media giants control give preferential treatment to DBS companies, which already enjoy structural cost and other advantages under federal law and the Commission’s rules.
- Diminished diversity of viewpoints and less local programming as the six media giants exercise greater and greater centralized editorial control over available programming, use their market power and retransmission consent rights to dictate the programming choices of local cable system operators and occupy so much channel space and extract so much of cable companies’ programming budgets that independent networks are unable to gain or maintain carriage.
- Loss of small, locally responsible cable companies that, lacking Mediacom’s financial strength, have been forced to close their doors or sell their systems to larger MSOs because they cannot absorb high and ever-increasing programming costs or pass them through to their customers, who lack the discretionary incomes of residents of the large metropolitan markets.

If the Commission relaxes its media ownership rules, including the 35% limit on television broadcast station ownership (the “Broadcast Cap”), these harmful effects will be magnified as the huge media companies that now control broadcast television and cable programming grow even bigger and more powerful.

Mediacom is acutely aware of the awesome market power wielded by the six giant media companies and, based on direct experience, knows that those companies are willing and able to use that power against those who do not march to their beat. More than once during past negotiations over carriage agreements that have expired or for newly acquired systems, programmers have made midnight-hour threats to “flip the switch” and “make the screen go dark” by ceasing delivery of their networks to Mediacom’s subscribers.

Mediacom recognizes that by making these reply comments it runs the risk of retaliation by one or more of the media giants. It is, therefore, making these comments with a fair degree of trepidation.

Mediacom's reluctance to present its views on the issues in this proceeding also stems from the fact that it has grown, over a few short years, into the eighth largest MSO without any financial assistance or other support from the government. Mediacom is simply not in the habit of looking to the government for help or solutions to its problems.

For these reasons, seeking the Commission's attention to the issues raised in these comments is by no means Mediacom's first choice. Unfortunately, it has become one of Mediacom's only choices because of the lack of responsiveness to its efforts over the past two years to deal with those issues in direct negotiations with the owners of broadcast and cable networks and through dialogue within the industry.

We would like to emphasize that not all of the cable networks or programmers are problems. There are many reasonably priced networks that offer value commensurate with their cost, tie annual increases more closely to inflation rates and do not engage in egregious bundling of networks. Those networks, like cable companies and subscribers, are also hurt by the practices of some of the high-cost networks because cable companies are left with less money, and less channel space, for reasonably priced networks and new networks that seek to break into channel lineups.

I. BACKGROUND

A. MEDIACOM COMMUNICATIONS CORPORATION

Mediacom was founded in 1995 and has grown rapidly since completing its first cable system acquisition in March 1996. Today, Mediacom's cable systems pass around 2.7 million homes and serve approximately 1.6 million basic subscribers in 23 states, offering an array of broadband services, including analog and digital video programming, high-speed

Internet access, video-on-demand (“VOD”) and high definition television (“HDTV”) services.⁶

Mediacom, now the eighth largest MSO in the country, occupies a unique place within the industry. One important distinguishing characteristic is that Mediacom focuses on providing entertainment, information and telecommunications services to the nation’s smaller cities and towns. Mediacom operates in approximately 1,500 franchise communities, of which about 85% contain 2,000 or fewer subscribers. Only around 14% of Mediacom’s customers are in the Top 50 Designated Market Areas (“DMAs”) as measured by A.C. Nielsen & Co., compared to the percentages for the top seven MSOs ranging from approximately 52% to 100%.⁷ Mediacom is the primary cable provider in only four of the Top 100 DMAs, with the biggest being the 72nd DMA, Des Moines-Ames, Iowa.

To a large degree, Mediacom’s creation was a direct outcome of policy choices made by Congress and the Commission in the early nineties. As a result of rate regulation instituted by the Cable Television Consumer Protection and Competition Act of 1992⁸ (the “1992 Cable Act”) and growing competition from satellite and telephone companies fostered by that legislation and the Commission’s rules and policies, many cable operators were exiting the business *en masse*, usually by selling their systems to or merging their companies with the largest MSOs. At the same time, the larger MSOs began to focus their growth and operating strategies on the major metropolitan markets and curtailed investment in their systems in small markets. As a result, the “digital divide” was growing wider as the large MSOs upgraded their systems in the big metropolitan areas, but largely ignored their systems in rural and small communities.

⁶ The states in which Mediacom provides cable service are Alabama, Arizona, California, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Virginia and Wisconsin.

⁷ Deutsche Bank Securities Inc., *Top 50 Markets Competitive Analysis*, Figure 14 (2002).

⁸ Pub.L. No. 102-385, 106 Stat. 1460 (1992).

Mediacom's founder sincerely believed that citizens of small communities deserve to have access to the same kinds, levels and quality of services as the residents of large metropolitan areas. Contrary to the prevailing opinions of industry leaders, Mediacom was also firmly convinced that a disciplined acquisition and system upgrade strategy would make it economically feasible to provide those services to consumers in small markets. Mediacom was created specifically for the purpose of acquiring and upgrading neglected cable systems in small to mid-sized markets, and that continues to be Mediacom's business strategy and focus today.

Since inception, Mediacom has spent approximately \$3.4 billion to acquire cable systems from larger operators such as AT&T Broadband (recently merged with Comcast Corporation), Tele-Communications, Inc. ("TCI"), Cablevision Systems Corporation ("Cablevision Systems"), Jones Intercable, and Triax Communications. Over the past five years alone, Mediacom has spent more than \$1.0 billion on capital expenditures to upgrade and support its acquired cable plant so that customers will be able to enjoy advanced broadband services that rival those offered in the large metropolitan markets. Currently, over 94% of Mediacom's cable plant is upgraded for delivery of advanced broadband services. Mediacom has built hybrid fiber-coaxial ("HFC") networks spanning over 17,000 fiber route miles and nearly 500,000 fiber strand miles, which has resulted in greater network reliability and allowed consolidation of headends, thereby lowering the capital cost per household to launch advanced broadband services in the small and mid-sized markets it serves.

Today Mediacom provides advanced broadband services like digital video, high-speed Internet access, VOD and HDTV. Mediacom currently offers digital cable service and high-speed Internet access to over 95% and 85%, respectively, of the homes passed by its cable systems, VOD service is available to approximately 18% of its digital video customers, and HDTV service has just been launched this month in several markets.

Mediacom expects to make high-speed Internet access available to about 95% of the homes passed by its cable systems by mid-2003.

While Mediacom has developed a presence in 23 states, including Alabama, California, Delaware, Florida, Georgia, Kentucky, Illinois, Indiana, Minnesota, Missouri and North Carolina, its achievements and the impact it has on its communities can be best illustrated by looking at its Iowa operations. Mediacom is by far the leading provider of cable television and broadband services in Iowa. Its systems pass about 900,000 homes in over 300 communities and deliver broadband services to approximately 86% of the 603,000 Iowa households that currently subscribe to cable service.⁹ Mediacom's Iowa customer base includes larger markets like Des Moines, Cedar Rapids, Iowa City and Davenport as well as small towns and rural areas such as Pocahontas, Fairbank and Manly. In fact, over 90% of the communities Mediacom serves in Iowa have fewer than 20,000 residents, and about 50% contain fewer than 2,000 residents.

Access to state-of-the-art telecommunications services is a crucial ingredient in Iowa's quality of life and business infrastructure. Iowa's economic fortunes are directly linked to the widespread introduction and adoption of advanced broadband services throughout the state. Since 1999, Mediacom has invested about \$250 million in the state of Iowa to transform older cable distribution plant into a state-of-the-art broadband network capable of providing advanced products and services to virtually the entire state, and in the process helped to transform Iowa into one of the most "wired" states in the union. Indeed, digital cable service and high-speed Internet access are now available to approximately 99% and 98%, respectively, of the homes Mediacom's systems pass in Iowa and VOD service is available to approximately 23% of its digital video customers in Iowa. Mediacom expects to continue to roll out VOD and HDTV services, and its capital expenditures have created the infrastructure needed to provide telephony and other interactive services in the future. As a

⁹ Warren Communications Telecom and Media Intelligence, *Telecom and Cable Factbook 2002*, Cable Volume 1 P-D413.

result of its acquisitions and investments, and its willingness to take the risk of pursuing a business strategy that was scorned by industry leaders, advanced broadband services are available not only in Iowa's biggest cities like Des Moines and Waterloo, but also in small towns like Red Oak, Eagle Grove and Eddyville.

In 1999, William E. Kennard, then the Commission's Chairman, stated that:

. . . we don't just need an Internet that goes faster. We need one that goes farther-that reaches all Americans, from the suburbs of Oak Park to the neighborhoods of Oakland, from the heights of Manhattan to the badlands of the Dakotas. We need to make sure that the opportunities that lie in this medium's wires and web pages are open to all Americans...that businesses large and small-whether in a small town in the Midwest or in an office park in Silicon Valley-can take advantage of the efficiencies that this technology offers and can reach the global markets that it brings to your doorstep... [and] that the skills needed to function in an Information Age economy are available to all of our children.¹⁰

Mediacom is proud that it has responded effectively to the call for action by Mr. Kennard, not just in Iowa but also in the other 22 states in which we operate.

Mediacom has made an enduring commitment to its Iowa communities not only through its significant investment, but also as a major employer and contributor to the local economy. For example:

- Mediacom employs nearly 1,100 Iowans and has an annual payroll of over \$40 million and growing.
- Mediacom paid more than \$10 million in franchise fees to local Iowa governments in 2002.
- Mediacom paid more than \$4 million in Iowa property taxes in 2002.
- Mediacom remitted \$14 million in sales tax from subscribers to the state of Iowa in 2002.

¹⁰ William E. Kennard, *The Road Not Taken: Building a Broadband Future for America*, Address Before the NCTA, Chicago, IL (June 15, 1999).

Mediacom also sets an example for good corporate citizenship by investing its financial resources, technology and staff time to make a difference in the communities where employees work and live.

- Mediacom's Cable in the Classroom initiative is available in all the schools passed by its broadband network. Mediacom provides free cable television service to public and private schools in Iowa, which have access to more than 540 hours of commercial-free, educational programming and online resources every month.
- Mediacom in Iowa participates in another Cable in the Classroom initiative, Cable's High Speed Education Connection, which provides consenting libraries and K-12 schools, passed by cable, with free broadband access where high-speed cable modem service is available. Staff from Mediacom's divisional office in Des Moines is working with the State Library of Iowa and the Bill and Melinda Gates Foundation to update computer systems in Iowa's small and rural libraries. As part of the project, the Gates Foundation is donating computer labs to small town libraries across the state and Mediacom is supplying free cable modem service. The project is helping Iowans explore the rich resources and services that are changing the way people access information and learn.
- Several of Mediacom's Iowa offices have employees who participate in Partners in Education ("PIE") projects with schools in their local communities. For example, the Waterloo office has participated in PIE since the early 1990s and maintains one of Mediacom's strongest PIE relationships. Employees volunteer as mentors to children at Orange School who were identified by teachers as in need of strong adult role models. Employees go to the school to help students with homework and play games. All of the students come from homes where there is weak parental involvement.
- Mediacom has created a local scholarship program to help graduating Iowa seniors get a head start on their education. Through its World Class Scholarship Program Mediacom will award 25 \$1,000 scholarships to students who graduate from high school this spring and enroll in college classes this fall.
- Mediacom is a gold level sponsor for the state's Iowa Games, the winter and summer amateur sports competition held in Iowa in February and July. This year, Mediacom donated \$1.4 million of in-kind services that included commercial airtime and television production work. The Iowa Games promote healthy competition, fitness and fun to young people in Iowa.
- Mediacom maintains ongoing public service announcement commitments with other nonprofit organizations in the state. Along with its commitment to the Iowa Games, Mediacom donates another \$2.2 million in airtime for public service.

- Mediacom partners with the Shoes That Fit organization to help provide shoes and clothing to low-income children. Mediacom's offices in Des Moines and Davenport each collected 3,300 items to donate to children through an arrangement with local schools.

Mediacom's local presence and attention to local needs in Iowa tell a compelling story, one that could be repeated many times over in small towns and cities that we serve like Bethany Beach, Delaware; Chillicothe, Illinois; Waseca, Minnesota; Yankton, South Dakota; Springfield, Missouri; Apache Junction, Arizona; and Hendersonville, North Carolina. The aggregate impact Mediacom has on small-town America's technological infrastructure, local economy and cultural development would increase with each example. Mediacom provides access to digital cable and high-speed Internet service to over 2.3 million homes and businesses; employs more than 3,500 dedicated workers, almost all of whom live and work in the areas Mediacom serves; has a payroll of over \$150 million; collects over \$30 million in franchise fees annually on behalf of local communities; pays over \$7 million in local taxes; donates free cable and high-speed Internet access service to thousands of schools and libraries; and supports hundreds of local charities with millions of dollars in cash donations and in-kind services. Mediacom's interests are clearly intertwined with hundreds of communities across the country, each with its own local government, local issues, local stories, local personality and, in Mediacom, a local cable and broadband service provider.

In approximately 1,500 communities throughout the nation, Mediacom has successfully bridged the digital divide that might have continued to disadvantage Mediacom's customers if its systems had remained in the hands of the larger MSOs from which they were acquired. This explosion of new products and services that Mediacom offers has truly enhanced the experience of its customers, who were previously underserved relative to consumers in major metropolitan markets. Mediacom also has invested in providing first-class customer service through 24/7 regional call centers, guaranteeing on-time installation and service calls. Mediacom never forgets that, ultimately, it is a collection of local businesses dependent on the goodwill and satisfaction of local consumers.

The more than 3,500 Mediacom employees who live and work in its franchised communities are justifiably proud of the company's accomplishments. They are also proud that the billions of dollars invested were raised entirely through the private and public capital markets, without any governmental subsidy or other financial support.

In the turbulent financial and economic environment of the past few years, in which not only hundreds of fledgling startups, but also long established companies in the global cable, media and telecommunications sectors have filed for bankruptcy protection, commenced financial restructurings or taken massive multi-billion dollar write-offs, Mediacom has thrived. Mediacom's success is a result of its focused and disciplined acquisition, operating, and investment strategies and a steadfast commitment to its customers and employees, underpinned by Mediacom's overall financial strength and well-earned reputation in the financial markets.

B. THE PLACE AND IMPORTANCE OF SMALL SYSTEM OPERATORS WITHIN THE INDUSTRY

Cable system operators in the United States range in size from the very small operator of a single small system to large MSOs. Table 1 shows the top ten MSOs as of September 2002.

TABLE 1: TOP TEN MSOs¹¹

Rank	MSO	Basic Subscribers	Share of Total Cable Subscribers
1.	Comcast ¹²	21,625,800	31.4%
2.	Time Warner Cable	10,862,000	15.8%
3.	Charter	6,697,900	9.7%
4.	Cox	6,263,400	9.1%
5.	Adelphia	5,775,400	8.4%
6.	Cablevision Systems	2,968,500	4.3%
7.	Advance/Newhouse	2,100,000	3.1%
8.	Mediacom	1,588,000	2.3%
9.	Insight	1,289,000	1.9%

¹¹ Derived from data available on the Website of National Cable & Telecommunications Association at http://www.ncta.com/industry_overview/top50mso.cfm, last accessed 2/2/03.

¹² Pro Forma to reflect merger of AT&T Broadband with Comcast in December 2002.

10.	CableOne	721,400	1.0%
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While the seven largest MSOs account for approximately 82% of all cable television subscribers, it is important to bear in mind that approximately 12.5 million American households receive their cable service from smaller MSOs, like Mediacom, or one of the hundreds of small, independently owned cable systems that individually serve only a few hundred or thousand subscribers. As already noted, the ACA has around 930 members who collectively serve 7.5 million cable subscribers, primarily in smaller markets and rural areas.

Mediacom has been a long-standing member of the ACA. Although it has grown to be the eighth largest MSO and is considerably bigger than the average ACA member, Mediacom is still only about half the size of Cablevision Systems, the sixth largest MSO, and only approximately one-fourteenth the size of Comcast Corporation (“Comcast”), the largest MSO. Mediacom retains many of the same interests as other ACA members, since its systems also serve small markets across the country. In addition, Mediacom, like ACA members generally, is not vertically integrated or affiliated with larger MSOs. Mediacom does not own any interests in broadcast stations, programming networks or other media.

In general, the most populous states and the largest cities and DMAs in the country are served by the largest MSOs. Over the past decade, as a result of their acquisition and divestiture strategies, the largest MSOs have clustered their operations around the major metropolitan markets. For example, Comcast’s “Mid-Atlantic Super Cluster,” with 4.4 million subscribers, includes clusters in Pennsylvania, New Jersey, Maryland, Virginia, the Washington, D.C. Metropolitan area, and Delaware.¹³ As a result of its recent merger with AT&T Broadband, Comcast acquired additional large clusters in the Chicago, San Francisco/Oakland/San Jose, and Boston areas, with approximately five million subscribers in those three clusters.¹⁴ Research by Deutsche Bank Securities Inc. on the degree of

¹³ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, CS Docket No. 01-129, 17 FCC Rcd. 1244, 1305 at ¶143 (2002) (“*Eighth Annual Report*”).

¹⁴ *Id.*

concentration of MSOs within the top 50 DMAs indicates that only about 14% of Mediacom’s subscribers are within these markets, while the corresponding percentages for the seven largest MSOs range from 52% to 100%.

C. COMPETITION

Cable system operators are part of the broader industry consisting of multichannel video programming distributors (“MVPDs”). In recent years, cable has lost significant market share to competitors, and by far the most significant competitors are DBS providers.¹⁵ According to the Commission’s Ninth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming,¹⁶ the number of cable subscribers as of June 2002 totaled 68.8 million, up 5.2% from 65.4 million in June 1998. On the other hand, the total number of DBS subscribers grew from 7.2 million as of June 1998 to 18.2 million as of June 2002, an increase of more than 153%. As Table 2 illustrates, DBS now accounts for over 20% of all MVPD subscribers, up from 9.4% in June 1998.

TABLE 2: COMPARATIVE GROWTH OF CABLE AND DBS SUBSCRIBERS¹⁷

	1998	2002	Percent Change
Total MVPD	76,600,000	89,900,000	17.4%
Total Cable Subscribers	65,400,000	68,800,000	5.2%
Percent of Total MVPD	85.4%	76.5%	
Total DBS Subscribers	7,200,000	18,240,000	153.3%
Percent of Total MVPD	9.4%	20.3%	

¹⁵ Other direct competitors include home satellite dish (“HSD”) service providers using low-power satellites requiring larger antennas at the subscriber’s premises than DBS service; wireless cable systems using frequencies in the multichannel multipoint distribution service; private cable or satellite master antenna television systems; and competitive coaxial cable systems operated within a franchise area by an “overbuilder” such as a local telephone exchange carriers or municipal electric and gas utilities. More indirect competitors include over-the-air broadcasting and other sources of entertainment such as live sporting events, movie theaters and home video products, including videotape recorders and videodisc players.

¹⁶ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, No. 02-145, ¶¶6, 13 (Rel. Dec. 31, 2002) (“*Ninth Annual Report*”).

¹⁷ *Id.*, Table B-1, Appendix B.

During the foreseeable future, DBS is expected to continue to grow at a rapid pace, while cable's market share correspondingly declines. Paul Kagan Associates predicts that total DBS subscribers will increase to almost 26 million in 2005 and to over 28 million in 2010.¹⁸ Cable's share of total multichannel subscribers is forecast to decline from 76.3% in 2001 to 67.9% in 2008.¹⁹

There are currently only four companies licensed by the Commission to provide DBS service: DirecTV, EchoStar (marketed as the DISH Network), Dominion Video Satellite, Inc. (marketed as Sky Angel) and Cablevision Systems' Rainbow DBS. Of these four, only DirecTV, EchoStar and Dominion currently provide service.²⁰ DirecTV and EchoStar are among the very largest providers of a multichannel video programming service, as Table 3 illustrates.

TABLE 3: TOP TEN MVPDS²¹

Rank	MVPD	Total Subscribers ²²	Share of Total MVPD Market ²³
1.	Comcast	21,625,800	24.1%
2.	DirecTV	11,160,000	12.4%
3.	Time Warner Cable	10,862,000	12.1%
4.	EchoStar	8,010,000	8.9%
5.	Charter	6,697,900	7.5%
6.	Cox	6,263,400	7.0%
7.	Adelphia	5,775,400	6.4%
8.	Cablevision Systems	2,968,500	3.3%
9.	Advance/Newhouse	2,100,000	2.3%
10.	Mediacom	1,588,000	1.8%

¹⁸ Paul Kagan Associates, Inc., *The State of DBS 2001*, 5 (2000). Kagan also predicts that total DBS industry revenue will triple from \$8.8 billion in 2000 to nearly \$26 billion in 2010. *Id.* at 6.

¹⁹ *Id.* at 27, Figure 17: U.S. Multichannel Industry Subscriber Projections.

²⁰ Dominion operates a niche, family-oriented service with fewer than one million subscribers using an EchoStar satellite.

²¹ For EchoStar and DirecTV, Skyreport.com; for MSOs, NCTA.

²² As of November 2002

²³ *Ninth Annual Report*, *supra* at note 16, Table B-1, Appendix B.

In terms of sheer size and market share, the top six cable MSOs and the two DBS companies are much larger than Mediacom and simply dwarf the average ACA member's 8,000 subscribers.

As a result of the The Satellite Home Viewer Improvement Act ("SHVIA") of 1999,²⁴ in addition to offering many of the same and certain exclusive non-broadcast programming services, DBS operators have begun to deliver local broadcast signals. This change in law eliminated a significant competitive advantage of cable system operators over DBS operators. As of December 2002, DirecTV and EchoStar delivered local broadcast signals to 51 and 52 DMAs, respectively, and DirecTV has announced plans to expand such carriage to as many as 50 additional DMAs by the end of 2003.²⁵

As was the intent of Congress with the 1992 Cable Act and SHVIA in 1999, DBS has had a significant effect on competition in the MVPD market. Naturally, cable operators must consider the impact of DBS competition in setting cable rates and in strategic decisions relating to upgrades or other measures to improve the quality of their service. In addition to the vastly greater market power they possess because of their size and far greater financial resources, the two national DBS companies enjoy significant cost and other advantages over Mediacom and other ACA members because of their favored regulatory treatment, as Table 4 indicates.

²⁴ 17 U.S.C. § 122, enacted as part of the Intellectual Property & Communications Omnibus Reform Act of 1999, Pub.L. No. 106-113, Div. B, § 1000(a)(9) (1999).

²⁵ Yahoo, *DirecTV to Launch up to 50 New Local Channels Markets in 2003* (Jan. 9, 2003), at <http://biz.yahoo.com/bw/030109/90453>, last accessed 2/2/03.

TABLE 4: COMPARISON OF REGULATORY BURDENS OF DBS VS. CABLE INDUSTRY

Regulatory obligation	Cable Industry	DBS
Carriage of broadcast signals	Mandatory carriage of broadcast signals on basic tier	May carry broadcast signals a la carte or in separate packages
Must-carry	Mandatory carriage of all eligible broadcast signals in all markets; Mandatory channel placement	Discretionary carriage of broadcast signals in any market, then carry one carry all; No mandatory channel placement
Carriage of premium services	Tier buy through prohibition	No tier buy through prohibition
Local programming obligations	Public, Education, Governmental and Leased Access Channels	No local programming obligations
Local franchise obligations	Must have local franchise May be required to pay local franchise fees up to 5% of gross May be required to contribute to PEG access capital costs May be required to contribute to Institutional Networks Customer service obligations	No franchise No franchise fees No PEG contributions No Institutional Networks obligations No customer service obligations
EAS obligations	EAS equipment in each headend serving less than 5,000	No EAS
Rate restrictions	Geographic uniform rate requirement	No restrictions

D. CABLE PROGRAMMING AND PROGRAMMERS GENERALLY

As the Commission knows, cable companies offer programming on a subscription basis, and organize their programming into "tiers" or packages of different mixes of programming services and with different subscriber charges. The primary, and usually least expensive, level of cable television service is commonly referred to as "basic service" and, under Federal law, must be taken by all cable television system subscribers in order to receive any level of service.²⁶ The content of basic service varies widely among cable

²⁶ See 47 U.S.C. § 547(b)(7)(A); 47 C.F.R. § 76.921(a).

systems but, pursuant to the Communications Act of 1934 (the “Communications Act”),²⁷ must include all local television signals and public, educational, and governmental access channels and, at the discretion of the cable operator, may include satellite delivered cable programming channels carried on the system.²⁸ In many systems, the next tier after basic service is typically referred to as “expanded basic,” and it adds more satellite-delivered cable programming networks or services to those provided on the basic tier. Some systems, however, offer a so-called “fat” basic tier that combines the basic and expanded basic tiers into a single tier.

Single-channel “premium” or “pay” services such as Home Box Office (“HBO”), Showtime or Starz/Encore are offered on a per-channel basis for an additional monthly charge or as a package comprised of several of the pay services at a single price. Pay-per-view (“PPV”) services are offered on a per-program basis, with subscribers placing orders for the specific programs they wish to view by telephone or using an interactive set-top box and remote control. The staple programming of pay-per-view services is newly released movies that are offered on a pay-per-view basis before they become available to premium movie channels, basic cable or broadcast networks. They also present sports and entertainment specials. PPV service is a separate category from premium service.

Cable systems are beginning to offer VOD service. VOD service is similar to PPV service because it permits subscribers to order individual movies or programs. PPV movies and events, however, are available only during fixed time slots, so viewers must conform their viewing to programming schedules. VOD movies and events may be viewed at any time selected by the viewer and provide the viewer with the capability to fast forward, rewind and stop the feature. VOD also allows consumers to watch their selection repeatedly within a certain time window.

²⁷ 47 U.S.C. § 151 *et seq.*

²⁸ 47 U.S.C. §§ 534-35.

Usually, basic and expanded basic tiers are offered as “analog” services. Cable operators may also offer digital packages or tiers that include the analog service plus additional digital channels.

Each distinct programming network or service is assigned a different “channel” on the system. The number of channels that any particular cable system can deliver depends on the bandwidth of the cable or fiber used in the system.²⁹ Video channel capacity on any given system will be decreased by the amount of bandwidth used for other services, such as connectivity to the Internet.³⁰ Older cable systems may have as few as twenty channels while newer ones may have more than 150 channels.³¹

²⁹ Analog networks or programming usually require 6 MHz of bandwidth, and the “channel capacity” of a given system is usually defined as the maximum number of 6 MHz video channels that the system can carry simultaneously. If a network or service is transmitted as a digital signal, then “compression” technology may allow use of the 6 MHz of bandwidth to deliver up to 12 separate signals. Traditional coaxial cable systems typically operate with 330 MHz or 450 MHz of capacity, whereas modern hybrid fiber/coax (HFC) systems are expanded to 750 MHz or more. Downstream video programming signals begin around 54 MHz, the equivalent of channel 2 for over-the-air television signals. The 5 MHz - 42 MHz portion of the spectrum is usually reserved for upstream communications from subscribers' homes. Since each standard television channel occupies 6 MHz of RF spectrum, a traditional cable system with 400 MHz of downstream bandwidth can carry the equivalent of 60 analog TV channels and a modern HFC system with 750 MHz or 860 MHz of downstream bandwidth has the capacity for some 110 channels or 128 channels, respectively. Video channel capacity can be decreased on any given system simply by using bandwidth for other services such as connectivity to the Internet.

³⁰ To deliver data services over a cable network, one television channel (in the 54 - 750 MHz range) is typically allocated for downstream data traffic to homes and another channel (in the 5 - 42 MHz band) is used to carry upstream signals.

³¹ Recently, the FCC conducted a survey of, among other things, cable system channel capacity. Preliminary results from the survey revealed that 48.8 million subscribers, or approximately 87 percent of all subscribers served by cable MSOs included in the survey are served by systems that provided bandwidth of 550 MHz or higher, and more than 76 percent are served by systems that provided bandwidth of 750 MHz or higher. Cable operators have allocated this bandwidth in a variety of ways, using a portion of this bandwidth for the provision of analog video, and a portion for the provision of digital video, with the remainder allocated for services such as Internet access and telephony. For example, systems with 750 MHz system capacity on average allocated 478 MHz or approximately 80 channels to analog video. Also, on average, 750 MHz systems

Within most cable systems, some of the channels available for video programming have to be set aside for networks or services that the cable operator is required to carry under mandatory provisions of the Communications Act, including channels devoted to retransmission of local broadcast television stations that the system “must carry” or carry under “retransmission consents” and channels dedicated to public, educational and governmental (“PEG”) programming or commercial leased access. Cable operators decide how to fill the remaining channels based on their analyses of various factors, such as their own financial, economic and technical resources and needs and local audience demographics and preferences. Cable systems invariably carry the signals of local broadcast stations, both because they offer popular programs and because of the requirements of federal law. The 1992 Cable Act requires cable operators and other MVPDs to carry signals of commercial television stations³² located within the same DMA as a cable system unless the broadcaster affirmatively elects to require the operator to negotiate a retransmission consent contract.³³ Every three years, commercial television stations must elect between pursuing their must-carry rights or seeking to negotiate a retransmission consent. This allows the station owner to seek to negotiate consideration for retransmission.

Many of the broadcast television stations that the cable operator carries are owned and operated by, or are affiliated stations of, the national broadcasting networks, ABC, CBS, FOX, NBC, UPN and WB. Others are independent local stations.

allocated 140 MHz for downstream digital video, which may yield a range of channels, depending on the modulation technique and compression ratio employed. *See Carriage of Digital Television Broadcast Signals, Amendment to Part 76 of the Commission’s Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, CS Docket Nos. 98-120, 00-96, 00-2, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 (2001) (“*DTV Signal Carriage Proceeding*”).

³² Noncommercial television stations do not have retransmission consent rights. 47 U.S.C. § 325(b)(2).

³³ The statutory “must-carry” obligations are set forth at 47 U.S.C. § 535. The Commission’s related regulations appear in 47 C.F.R. part 76, Subpart D, 47 C.F.R. § 76.51 *et. seq.*

The bulk of cable programming consists of networks or services that are produced solely for delivery by satellite transmission to cable operators or other MVPDs and are not available on an “over-the-air” or broadcast basis. Although most of these networks and services are now distributed by DBS companies and other MVPDs, as well as cable operators, they are commonly called “cable networks.” The owners of these networks are commonly called “programmers.” Cable networks included on the basic or expanded basic tiers of cable service are frequently called “basic cable networks.” In 2002, there were 308 satellite-delivered national programming cable networks.³⁴ The basic networks include such well-known networks as A&E, CNN, C-SPAN, Discovery, The Disney Channel, ESPN, Fox News, MTV, Nickelodeon, Home Shopping Network, Lifetime, QVC, TBS, TNT and USA Network. Cable services offered on a premium, a la carte or digital tier are usually called “premium,” “a la carte” or “digital” networks, respectively.

Basic cable programming is offered as branded “networks” that are distinguished from each other by various means, including by selection and arrangement of the programming based on a theme or other organizing principle—for example, CNN is a network that primarily offers news, while the Food Network offers programs related to cooking and food. A few cable networks offer a mixture of different programming types intended to appeal to a broad audience like that of the major broadcast networks. One example is USA Network. Most cable programming, however, is “narrowcast”—meaning that it is targeted at specialized audience groups, such as women, children or ethnic groups, or is organized around a central theme or interest, such as news, sports, weather, comedy, history or cooking. Narrowcast programming attracts advertisers who want to target marketing to specific demographic groups or audiences with particular interests.

The content of cable networks is owned or licensed by the programmers and is protected by copyright and other laws. Cable operators, therefore, need the programmers’ permission to distribute the programming to subscribers, and the vast majority of the non-

³⁴ *Ninth Annual Report, supra* at note 16, ¶ 134.

broadcast networks and services charge cable operators fees for that permission. These fees are commonly referred to as “license” or “affiliation” fees.

License fees usually are "per-subscriber" or "per-sub" fees, meaning that the cable operator pays a monthly fee for each cable system subscriber to whom the cable operator delivers the tier of programming services that includes the network in question. The per-subscriber fee is not dependent on whether the subscriber actually views the programming on the network and does not vary with the network’s ratings or other factors that reflect its popularity.

The standard license fees for cable networks vary widely. For example, ESPN is much more expensive than The Weather Channel. The prices paid by MVPDs for any given cable network can also vary widely because programmers grant discounts to their standard rates or other concessions based on the size (subscribership) of the MVPD and other factors. In order to gain carriage of a new network, the programmer may offer MVPDs incentives to begin carrying the network on its systems. For example, the programmer may offer “launch support” in the form of a cash payment or media buys for each subscriber that receives the new network.

In addition to collecting license fees from MVPDs, most basic cable networks derive advertising revenues.³⁵ The rates paid by advertisers tend to be lower for cable networks than for ABC, CBS, NBC, Fox or other broadcast networks, since audiences are smaller.³⁶

³⁵ A few basic cable networks do not carry commercial advertising and derive all or most of their revenues from cable operator fees. For example, C-SPAN, which features the proceedings of the House and Senate, is non-commercial. All revenue comes from money paid to it by the cable systems. The home shopping networks, such as Home Shopping Network and QVC, currently do not charge cable operators, and they earn money from sales of featured products to viewers who order by telephone.

³⁶ Rating “shares” for cable networks rarely exceed a 4, while the broadcast networks achieve ratings ranging from 2 to 8. An important reason that cable network ratings are lower is that their programming tends to be designed to appeal to specific targeted audiences, rather than the broad audiences that the broadcast networks try to reach. Broadcasting and Cable (Nov. 25, 2002), at <http://www.broadcastingcable.com>.

Most ad-supported cable networks allow local cable operators to insert ads (called "ad avails") during designated programming segments.³⁷

Broadcast stations carried over cable are usually the most heavily viewed, and surveys indicate that most cable subscribers regularly view only five to nine of the cable networks.³⁸ While most cable networks attract fewer viewers than broadcast stations, those viewers can, in some cases, be intensely loyal, particularly in the case of sports programming.

Networks differ in programming costs and attractiveness to viewers and advertisers. In general, the more popular a network, the higher the affiliation fees. Other factors also influence license fee rates, however. For example, a network that has lower overall ratings than another may be able to charge higher license fees because its core viewers are more loyal and more likely to drop cable service or switch to DBS if the system does not carry the network. This is the case with sports networks, which have the highest license fees among the basic cable networks.

E. THE IMPORTANCE OF SPORTS NETWORKS

There are relatively few national networks that focus on providing live sporting events, news and other sports-related programs. ESPN, the most widely distributed national sports network, is owned by ESPN, Inc., which is 80% owned by The Walt Disney Company ("Disney") and 20% owned by the Hearst media conglomerate. As of June 2002,

³⁷ Premium services, such as HBO/Cinemax, Showtime/TMC and Starz/Encore, do not sell advertising. They derive all income from the cable systems that carry them. The systems, in turn, charge consumers subscription fees for each pay network, usually at a rate of \$10 to \$20 per month per pay service. The systems and the networks divide the consumer fee, usually about 50-50, but this ratio is subject to negotiation. In the case of pay-per-view services, the content-provider and the system divide the subscriber fees, based on a negotiated percentage. The subscriber pays what the market will bear. Movies can be seen for a few dollars, while major sports events may have a price tag in the \$20 to \$50 range.

ESPN reached 86,300,000 television households through a variety of delivery technologies,³⁹ placing it second among the highest ranked cable networks in terms of subscribers.⁴⁰ Fox Sports Net, jointly owned by News Corporation and other partners, reaches 74,000,000 television households.⁴¹ ESPN, Inc. also owns three other national sports networks: ESPN2, which reaches 83,600,000 television households;⁴² ESPN Classic, which reaches 46,900,000 television households;⁴³ and ESPNNews, which reaches 32,900,000 television households.⁴⁴ In addition to the national sports networks, there are 30 regional sports network constituting 35% of the 86 regional cable networks. Regional sports distribution is dominated by Fox Sports Net, which owns 58% (18 of 31) of all regional sports networks.⁴⁵ Both Disney and News Corporation also have interests in sports teams and sports venues.

There are also specialized sports networks, such as The Golf Channel and Speed Channel (which offers NASCAR auto racing and is owned by News Corporation). Several networks, although not primarily sports networks, offer significant sports programming. For example, TNT, a general entertainment network owned by AOL Time Warner, Inc. (“Time Warner”), offers some National Basketball Association games and NASCAR races and FX, another general entertainment service owned by News Corporation, carries some NASCAR races.

³⁸ Museum of Broadcast Communications, *United States: Cable Television*, available at <http://www.museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm>.

³⁹ National Cable & Telecommunications Association, *Top 20 Cable Networks Ranked By Number of Subscribers*, available at http://www.ncta.com/industry_overview/top20networks.cfm?indOverviewID=59 (“*Top 20 Cable Networks*”).

⁴⁰ *Id.* The top cable network was TBS Superstation, with 87,300,000 subscribers.

⁴¹ National Cable & Telecommunications Association, *Regional Cable Networks*, Cable Television Developments, 174 – 200 (2001). Kagan World Media Estimates Fall/Winter 2002-2003, P-34 (“*Kagan 2002-2003*”).

⁴² *Top 20 Cable Networks*, *supra*.

⁴³ *Kagan 2002-2003*, *supra* at P-36.

⁴⁴ *Id.*

⁴⁵ *Ninth Annual Report*, *supra* at note 16, ¶ 145.

Most cable system operators consider sports programming to be critical to their success.⁴⁶ As the Commission itself has suggested, sports programming is unique because of its “widespread appeal and strategic significance for MVPDs.”⁴⁷ A significant number of subscribers and potential subscribers care deeply about sports and will not subscribe to a service that does not carry their preferred sports programming.⁴⁸ According to a survey conducted by RCN, 40% to 58% of cable subscribers indicated that they would be less likely to subscribe to a cable system if it lacked local sports programming.⁴⁹ If a cable company drops a sports network rather than pay the high affiliation fees most sports services charge, it will lose customers to DBS. As the battle in the New York metropolitan area between Cablevision Systems and the Yankees Entertainment Sports Network (“YES”) demonstrates, a cable company that decides to drop or not carry a sports network could find itself the target of expensive lawsuits and a negative public relations campaign launched by the network seeking to force its way back onto the channel lineup.⁵⁰

F. SIX GIANT MEDIA CONGLOMERATES CONTROL MOST CABLE PROGRAMMING

As the Commission recognizes in the *Notice*, the past few decades have seen remarkable growth in the scope and reach of the media, diversification of media forms and

⁴⁶ See, e.g., *Eighth Annual RCN Initial Comments* at 13 (Sports programming is critical to the success of any cable television system).

⁴⁷ *Eighth Annual Report*, *supra* note 13, at ¶ 14.

⁴⁸ *Id.* at ¶¶ 171-74; See also, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Seventh Annual Report*, CS Docket No. 00-132, ¶ 183 (Rel. Jan. 8, 2001) (“*Seventh Annual Report*”); General Accounting Office, *Impact of Sports Programming Costs on Cable Television Rates*, GAO/RCED-99-136, at 3 (June 1999) (“*GAO Report*”).

⁴⁹ *Seventh Annual Report*, *supra* at ¶ 132.

⁵⁰ R. Thomas Umstead, *YES Sues, While ESPN Hikes Fees*, Multichannel News, May 6, 2002, see also, *YES Comcast Rates Will Go Up*, Multichannel News, March 26, 2002; Steve Donahue, *Dolan: We’ll Carry YES For Free*, Multichannel News, March 26, 2002; R. Thomas Umstead, *Cablevision, YES Strike Out On Deal*, Multichannel News, April 1, 2002; Ted Hearn, *YES Fracas Might Be A Federal Case*, Multichannel News, Aug. 5, 2002; R. Thomas Umstead, *YES Down a Run, Still Pitching*, Multichannel News, July 28, 2002.

modes of delivery and technological advances, but also a profound shrinkage of the number of media owners. Many commentators, both within and outside of this proceeding, have remarked upon the explosive consolidation within the media industry that has occurred in the last decade. In 1982, when media observer Ben H. Bagdikian completed research for his book, *The Media Monopoly*, he found that 50 corporations controlled half or more of the media business. By December 1986, when he finished a revision for a second edition, the 50 had shrunk to 29. By the time of the third edition in 1990, the number had dropped to 23. By the fifth edition in 1997, the number was down to 10.

Ownership of the major cable programming networks and services is highly concentrated. Most of the cable television programming services are owned by six giant media companies: Disney, General Electric Company (“GE”), which owns the NBC media properties, The News Corporation Limited, which owns the Fox media properties (“News Corporation” or “Fox”), Time Warner, Viacom Inc. (“Viacom”) and Liberty Media Corporation (“Liberty Media”). Those six companies, which are sometimes referred to as the “Big Six” for convenience, own or have interests in 30 of the 36 advertising-supported basic cable networks that were top-rated during the week of January 13, 2003. There are cross-ownership and other interlocking relationships between some of the six companies that control cable programming. For example, Liberty Media owns approximately 4% of Time Warner and around 18% of News Corporation. Each of the six companies also has one or more cable programming joint ventures with one or more of the others.

In addition to their cable network/services holdings, five of those six media companies have interests in virtually every media sector, including ownership of broadcast television and radio networks and stations, motion picture and television program production and distribution facilities, newspaper, magazine and book publishing units and record companies.

Disney owns or has interests in:

- The ABC television network;
- Ten owned and operated local broadcast television stations;
- The ABC Radio Network, with 420 affiliate radio stations, including 28 owned and operated systems;
- Movie, video and television production studios, including Disney, Buena Vista, Miramax, Dimension Pictures and Hollywood Pictures;
- Magazine and newspaper publishing;
- Book publishing;
- Several music labels;
- Theme parks and resorts;
- The Disney Cruise Line;
- Two professional sports teams—the Anaheim Mighty Ducks (NHL) and the Anaheim Angels (MLB);
- More than 550 retail stores worldwide; and
- 19 cable networks.

GE owns or has interests in:

- The NBC television network;
- 24 owned and operated local broadcast television stations; and
- 19 cable networks, including five regional sports networks.

News Corporation owns or has interests in:

- The Fox broadcasting network;
- 35 owned and operated local broadcast television stations (the largest US station group);
- Satellite services;
- Movie, video and television production, including Twentieth Century Fox;
- Some 130 newspapers;

- Twenty-five magazines, including TV Guide;
- Book publishing interests, including HarperCollins;
- The Los Angeles Dodgers baseball team; and
- 27 cable networks, including 18 regional sports networks.

Time Warner owns or has interests in:

- The Internet service providers America Online, Compuserve and Netscape;
- The WB television network;
- The Warner Brothers and New Line Cinema movie studios;
- A library of more than 6,000 films, 25,000 television programs, books, music and cartoons;
- Twenty-four magazines, including Time, People, Sports Illustrated; 50% of DC Comics;
- The second-largest book-publishing operation in the world, including Time-Life Books and the Book-of-the-Month Club;
- Warner Music group;
- Six Flags theme park chain;
- The Atlanta Hawks and Atlanta Braves professional sports teams;
- Cable television systems serving over 10.8 million subscribers, making it the second largest MSO in the country; and
- 39 cable networks.

Viacom owns or has interests in:

- The CBS and UPN television networks;
- 35 owned and operated local broadcast television stations;
- The CBS Radio Network, with nearly 1,500 affiliate radio stations, including 186 owned and operated systems;
- Blockbuster Video, the world's largest video rental chain;
- Blockbuster Music;

- Book publishing, including Simon & Schuster, Scribners and Macmillan;
- Movie, video and television production, including Paramount Pictures;
- United Cinemas International, one of the world's largest movie theater companies;
- Five theme parks; and
- 38 cable networks.

Liberty Media has ownership interests in approximately 41 cable networks and, because of its prior ownership by TCI (acquired by AT&T Corp. in 1999), distribution rights for most or all of its cable networks on the systems that were formerly owned by AT&T Broadband and are now owned by Comcast. It also owns interests in numerous other media properties.

Five of the Big Six own all of the national broadcast television networks and four of those five companies also own and operate local broadcast stations. Their control over popular prime time programming coupled with their rights under the retransmission consent rules give those four companies tremendous leverage in negotiating with cable companies for carriage of their cable networks.

Another important fact is that many cable networks are vertically integrated with at least one MSO. Eight of the top 20 video programming networks (ranked by subscribership) are vertically integrated with a cable MSO.⁵¹ In addition, nine out of the top 20 video programming networks ranked by prime time ratings are vertically integrated with cable MSOs.⁵² Of the 308 satellite-delivered national programming networks in 2002, 92 networks, or approximately 30%, were vertically integrated with at least one cable MSO.⁵³ Four of the top six cable MSOs hold ownership interests in cable networks, and one or more

⁵¹ *Ninth Annual Report, supra* at note 16, at 98, Table C-6.

⁵² *Id.*, Table C-7.

⁵³ *Id.* at 59, ¶ 134.

of those companies have interests in 79 of the 92 vertically integrated cable networks.⁵⁴ These four companies are Cox Enterprises, Inc. (“Cox”), which has interests in 25, or 8% of all national programming networks; Time Warner, which has an ownership interest in 39, or 13% of all national programming networks; Comcast, which has ownership interests in nine networks, which account for 3% of all national programming networks; and Cablevision Systems, which owns five national programming networks, representing just over 2% of all national programming networks.⁵⁵ On August 10, 2001, Liberty Media was split off from AT&T Corp. and is now an independent company; however, through its ownership of Cablevision of Puerto Rico, it remains a small cable system owner. It has interests in 41 national networks, or 13% of all programming networks.⁵⁶ Many of the regional networks are also owned at least in part by the largest MSOs, including many of the 31 regional sports networks.⁵⁷

Concentration among cable companies has also occurred. As a result of its just-completed merger with AT&T Broadband, Comcast’s systems now serve nearly 22 million subscribers, representing approximately 31% of all basic cable subscribers and over 24% of the total MVPD market.

The DBS industry has also seen consolidation and rapid growth in market share. There are only two DBS companies worth mentioning, DirecTV and EchoStar, which collectively control over 21% of the MVPD market.

Mediacom now finds itself operating in a landscape totally dominated by six huge media conglomerates, a few giant MSOs and two national DBS companies that have grown to more than five times the size of Mediacom and over 1,000 times the size of the average ACA member.

⁵⁴ *Id.* ¶ 135.

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 136.

II. EFFECTS OF MEDIA CONSOLIDATION ON INDEPENDENT, NON-VERTICALLY-INTEGRATED CABLE COMPANIES

From the perspective of Mediacom and the hundreds of other non-vertically-integrated, independent cable companies, consolidation of the media industry has been largely negative. Among other things, it has resulted in higher cable rates, the use by media giants of their vast market power to tie carriage of weak networks with popular programming, and fewer channels available for carriage of independent programming services. In addition, the industry has faced complaints by consumers, franchise authorities and local, state and federal legislators and officials who typically blame cable operators because they are unaware that programmers are a major reason subscribers are forced to pay increased prices for popular channels and for programming they might not want.

A. THE GIANT MEDIA CONGLOMERATES HAVE VASTLY GREATER MARKET POWER AND NEGOTIATING LEVERAGE

Media consolidation and the emergence of the DBS industry as an effective competitor to cable have caused a radical shift in the relative market power of programmers and distributors other than the very largest MVPDs. The six programming cartels that control virtually all of the most popular cable networks have vastly greater financial and other resources than all but the largest MSOs. Indeed, some of those conglomerates include the large MSOs. Increased competition between DBS and cable operators has also added immeasurably to the programmers' market power.

Most of the top 45 cable networks are already fully distributed among cable operators. In other words, those networks are already being delivered to subscribers and negotiations with programmers for those networks occur as existing affiliation agreements expire. When an affiliation agreement for a network is about to expire, the programmers' bargaining power in renewal negotiations far exceeds that of all but the largest MSOs.⁵⁸

⁵⁷ *Id.* at 89-91, Table C-3.

⁵⁸ The same situation also arises when one cable company buys cable systems from another. Typically, programmers include in their programming agreements provisions

Essentially, in negotiations for continued carriage of a network, leverage for the network owner ultimately derives from its ability to discontinue delivering the network to the cable operator's systems. Similarly, the cable operator's ultimate leverage comes from its ability to drop the network from its systems. Although both parties' leverage derives from the same basic source—discontinuance of carriage of the network—that does not mean that they have equal bargaining power.

In theory, if a cable operator drops the network, then the programmer potentially suffers two negative consequences: (i) loss of revenues in the form of license fees that otherwise would be paid by the cable company and (ii) loss of advertising revenues if, because of loss of distribution in the cable company's systems, advertisers insist on lower advertising rates. The cable company faces: (i) loss of revenues in the form of subscription fees that otherwise would be paid by those subscribers who are most loyal to the dropped network and switch to DBS or simply drop expanded basic service, (ii) loss of revenues if the cable company has to decrease, or limit a planned increase, in the prices it charges subscribers because the network is no longer delivered and (iii) subscriber and franchise authority complaints, which may induce municipal overbuilds or have other long-term consequences.

The outcome of negotiations ultimately depends on which party has the most to lose if the network is discontinued. For several reasons, it is usually the programmer who is in a better position to weather the consequences of discontinuance, and so it is usually the cable company that caves in and agrees to the programmers' terms.

that prohibit assignment or otherwise prevent the pricing and other terms from being passed through to the buyer. If the buyer does not have its own agreement for carriage of the network, then it is faced with negotiating an agreement under the pressure of knowing that the programmer may discontinue the service at any time and that subscribers to the acquired systems may be upset if they lose a network that they received while the systems were owned by the seller.

Increased competition between the DBS and cable industries has added to the already vast market power of programmers. It is more difficult for a cable operator to drop a popular network that is also carried by a DBS company because unhappy subscribers might switch to DBS. To the extent that customers do switch, the programmer will replace lost cable company affiliation fees with additional fees paid by the DBS provider. In addition, to the extent that subscribers switch to DBS, they continue to be included in the programmer's subscriber base for purposes of setting advertising rates.

Programmers actually support efforts of DBS providers in those circumstances through various means. For example, in response to Cablevision Systems' decision not to carry the YES network, YES began a campaign of newspaper advertisements urging Cablevision Systems subscribers to switch to DBS services that carried the YES network. In one particularly difficult negotiation, Mediacom learned that the programmer had already prepared advertisements of these kinds and arranged for them to be published in newspapers throughout Mediacom's franchise areas. In another case, Mediacom has actually been the target of a "switch to DBS" campaign when it dropped two networks controlled by one of the Big Six, even though Mediacom continued carriage of six other networks owned by the conglomerate. Naturally, the more popular the network, or the more loyal its viewers, the greater the number of subscribers who will be lost if it is dropped. The bundling practices of the programmers mean that it is rarely only one network that is the subject of renewal negotiations. Failure to reach a renewal deal may result in several networks being discontinued.

The loss faced by the programmer if a network is dropped is far less significant than that faced by the cable company. As noted above, the average ACA member company serves 8,000 subscribers, which is about nine one-thousandths of one percent of the approximately 89,900,000 MVPD customers who represent the total market for a cable network in the U.S. Even though Mediacom is much larger than the average ACA member, its 1.6 million subscribers represent less than 2% of the total market, as compared to the

market shares of the top five MSOs and the two DBS companies that range from 6.4% to 24%. As a result, it is unlikely that if Mediacom or another ACA member dropped a network, the resulting loss of subscribers, on a net basis taking into account switches to DBS, would be significant enough to require a reduction of the network's rates charged to advertisers. The programmer, in other words, probably would suffer, at worst a minimal loss of advertising revenues.

The programmer would lose affiliation fees for the cable company's subscribers who do not switch. For the most popular networks, it is estimated that affiliation fees paid by operators account for approximately 50% of a programmer's total revenues, with the balance consisting of advertising revenues.⁵⁹ If the average ACA member, or even Mediacom, dropped a network, the lost affiliation fees suffered by the programmer would be immaterial.

If the average ACA member, who derives substantially all of its revenues from subscriber payments for cable television service, lost 10% of its subscribers because they switched to DBS, it would lose nearly that percentage of its revenues, while the loss of that member's affiliation fees would be a miniscule percentage of the programmers' revenues.

B. HIGH AND RAPIDLY RISING PROGRAMMING COSTS

1. Explosive Growth in Fees Charged by Programmers

The market power enjoyed by the Big Six media powerhouses has permitted programmers to drive license fees paid by cable companies to unprecedented levels and impose annual rate increases that far exceed inflation. Although the Commission's own reports demonstrate that the monthly per channel revenue per subscriber for basic and expanded basic services has actually declined over the past several years, the absolute amount that subscribers pay every month has grown, and those increases have been a lightning rod for consumer complaints. Subscribers, and many legislators and public

⁵⁹ *Kagan 2002-2003, supra* note 41, at 30-31.

officials who receive their complaints, generally do not understand that programming costs are a major contributing factor.

TABLE 5: COMPARISON OF REVENUE AND PROGRAMMING COSTS - 1996 AND 2001⁶⁰

Basic Service and CPST Tiers:	1996	2001	CAGR⁶¹
Revenue (in thousands)	\$18,395,000	\$27,031,000	8.0%
Programming Cost (in thousands)	\$3,121,000	\$7,200,000	18.2%
Programming Cost/Revenue	17.0%	26.6%	
Basic Subscribers (in millions)	62.8	68.6	1.8%
Monthly Revenue per Basic Sub.	\$24.41	\$32.84	6.1%
Monthly Programming Cost per Basic Sub.	\$4.14	\$8.75	16.1%
Total Channels ⁶²	43.3	59.4	6.5%
Monthly per Channel Revenue per Basic Sub.	\$0.56	\$0.55	-0.4%
Monthly per Channel Programming Cost per Basic Sub.	\$0.10	\$0.15	9.0%

As shown in Table 5, based on information from various Commission reports, from 1996 to 2001 the cable industry's combined revenues from basic and expanded basic services increased from \$18.4 billion to \$27.0 billion, a compounded annual increase of 8.0%, while programming costs for such services increased from \$3.1 billion to about \$7.2 billion, a compounded annual increase of 18.2%. After adjusting for an increase in cable

⁶⁰ Table 5 presents programming cost, revenue and subscriber data derived from several Commission sources:

- 1) *Ninth Annual Report, supra* note 16, ¶¶ 26, 29, Tables 4, 156;
- 2) *In the Matter of Implementation of Section 3 of the Cable Television Consumer and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, (2002), Report on Cable Industry Prices, FCC 02-107, ¶ 21, Table 1 (“*2001 Cable Industry Price Report*”);
- 3) *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, CS Docket No. 97-141 Fourth Annual Report, FCC 97-423, ¶ 20, Table B-6, (“*Fourth Annual Report*”);
- 4) *In the Matter of Implementation of Section 3 of the Cable Television Consumer and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, (1997), Report on Cable Industry Prices, FCC 97-409, at 9-10, Tables 2 & 3, (“*1997 Cable Industry Price Report*”).

⁶¹ Compounded Annual Growth Rate.

subscribers during the period (from about 62.8 million in 1996 to 68.6 million in 2001), monthly revenue per subscriber for those services increased from \$24.41 to \$32.84, a compounded annual revenue growth rate of 6.1%, while corresponding monthly programming cost per subscriber grew from \$4.14 to \$8.75, a 16.1% compounded annual increase. In effect, soaring programming costs eroded analog video's gross margin by nearly 10 percentage points in just five years.

Although the increase in programming costs is shocking, there is an underlying trend that is not apparent from the initial analysis. As part of the cable industry's significant capital investment program during the 1996-2001 period, which amounted to over \$65 billion,⁶³ the weighted average channels offered for basic and expanded basic services increased from about 43.3 to 59.4.⁶⁴ Accordingly, on a per subscriber basis, the monthly revenue per channel actually decreased from \$0.56 in 1996 to \$0.55 in 2001, a compounded annual decrease of 0.4%, while monthly programming cost per channel grew by over 50% from \$0.10 to \$0.15, a compounded annual increase of about 9.0%. By comparison, inflation as measured by the Consumer Price Index increased approximately 2.2% annually over this span.⁶⁵

The data in the Commission's reports clearly support the thesis that the rapid and large increases in programming costs have been the single largest factor behind increases in the monthly fees cable operators charge their subscribers. The annual reports published by the Commission under Section 623(k) of the Communications Act compare prices charged by cable operators facing effective competition (as defined in the 1992 Cable Act) with those of operators not facing effective competition. The reports, each of which covers a one year period beginning each July, are based, in part, on surveys of cable operators selected as

⁶² As of July 1 in each year. Total Channels for 1996 based on average of competitive group and noncompetitive group.

⁶³ *Ninth Annual Report*, *supra* note 16, at ¶ 33.

⁶⁴ *2001 Cable Industry Price Report*, *supra* note 60, at ¶ 5.

⁶⁵ U.S. Department of Labor, Bureau of Labor Statistics, *Consumer Prices Indexes*, at <http://www.bls.gov/cpi>, last accessed 2/3/03.

part of a random sample representative of industry respondents to Commission data requests. As part of the surveys, operators are asked to explain changes in their rates during the year covered by attributing those changes to increased costs or other factors. The annual reports for the three years ended July 1, 2001 show that increases in programming costs—excluding channel additions—accounted for anywhere from 43.6% to 53.3% of the increase in monthly charges to subscribers in competitive systems, and 46.0% to 51.0% in noncompetitive systems, as detailed in Table 6.

TABLE 6: EXPLANATION FOR CHANGES IN RATES⁶⁶

	Competitive Group			Noncompetitive Group		
	7/1/99	7/1/00	7/1/01	7/1/99	7/1/00	7/1/01
Programming Costs*	53.3%	43.6%	50.7%	51.0%	46.0%	46.1%
Inflation	15.1%	12.3%	10.6%	10.0%	13.8%	14.7%
Channel Additions**	7.9%	9.2%	14.0%	6.5%	8.0%	12.1%
System Upgrades/Equipment	21.6%	15.3%	10.6%	22.4%	14.4%	9.9%
Unspecified Costs	3.6%	13.5%	9.2%	5.9%	10.3%	13.4%
Changes Not Based on Costs	-1.5%	6.1%	4.9%	4.2%	7.5%	3.8%
*Increases in costs on existing programming, including copyright fees.						
**Includes the cost of programming for newly added channels.						

Based on Mediacom's own experience, it is the established national channels and regional sports networks owned by giant vertically-integrated media companies that are forcing programming costs higher, and not the newer services that are typically available at reasonable cost and often include launch support or programmer purchases of advertising time on the cable operator's systems to promote the channel. In fact, a disproportionate share of the increase in basic programming costs over the past several years can be attributed to the increases in the wholesale rate charged to cable operators by ESPN, the emergence of regional sports networks and the forced conversion of The Disney Channel from a premium a la carte service to a basic service in the late 1990s.

⁶⁶ For 1998 and 1999, 1999 Report on Cable Industry Prices, Table 10, p.15. For 2000 and 2001, 2001 Report on Cable Industry Prices, Table 7, p. 11

Sports programming costs have had a dramatic effect on companies like Mediacom. The per-subscriber license fees paid by cable operators for sports networks have increased at rates far in excess of the rates for non-sports networks. Sports channels cost cable companies several times the price of the average non-sports basic cable network and have seen double-digit annual price increases for the past several years.

Mediacom is unable to share with you information about the rates that it pays sports programmers because of the risk of lawsuits by programmers claiming breach of confidentiality provisions they include in programming agreements. There is, however, some publicly available information. According to one estimate, from 1999 to 2002, affiliate revenue per subscriber increased by over 59% for ESPN and 48% for Fox Sports, as compared to an average of about 17% for the top 39 non-sports programming networks. Tables 7 and 8 give additional data, although Mediacom believes that the affiliation fees in Table 8 may be understated.

TABLE 7: GROWTH IN AFFILIATE FEES FOR SPORTS NETWORKS⁶⁷

Network	Affiliate Fee Revenue Growth		
	2000	2001	2002(Estimated)
ESPN	22.3%	23.2%	19.6%
ESPN2	27.4%	16.8%	8.5%
ESPN Classic	40.0%	65.0%	0.0%
ESPNNews	27.8%	69.6%	20.0%
Fox Sports	59.3%	10.4%	11.2%

⁶⁷ Bilotti, Morgan Stanley Exhibit 12 and 13, p. 25, 26, December 27, 2002.

TABLE 8: COMPARISON OF SPORTS AND NON-SPORTS PER-SUBSCRIBER AFFILIATE FEES⁶⁸

	1999	2000		2001		2002 (Estimated)	
	Per-Subscriber Affiliate Revenue	Per-Subscriber Affiliate Revenue	Percentage Increase Over Prior Year	Per-Subscriber Affiliate Revenue	Percentage Increase Over Prior Year	Per-Subscriber Affiliate Revenue	Percentage Increase Over Prior Year
ESPN	\$1.01	\$1.19	17.8%	\$1.40	17.7%	\$1.61	15.0%
Fox Sports	\$0.56	\$0.79	41.1%	\$0.83	5.1%	\$0.83	0.0%
Average For Thirty-Nine Non-Sport Networks	\$0.16	\$0.17	4.5%	\$0.18	3.3%	\$0.19	5.5%
Total For Thirty-Nine Non-Sport Networks	\$6.39	\$6.68	4.5%	\$6.90	3.3%	\$7.28	5.5%

ESPN has raised its rates by up to 20% each year for the past four years⁶⁹ and, according to one newspaper report, the cost of the ESPN channel has nearly doubled in five years, to almost \$2 per subscriber per month, making it one of the most expensive basic channels.⁷⁰ Despite these facts, Disney refuses to take responsibility for the impact its huge annual price increases have had on subscriber rates.⁷¹ During the same period, ESPN's household ratings have declined from a high of 0.78 in 1998 to 0.60 in 2001.⁷² The regional sports networks, which are dominated by Fox Sports Net, also charge fees that far exceed the average basic cable network and have implemented double digit annual increases in the past.

⁶⁸ Bilotti, Morgan Stanley Exhibit 12, p. 25 December 27, 2002.

⁶⁹ *ESPNEyes New Long-Term Pacts*, Multichannel News, January 6, 2003.

⁷⁰ Jennifer Lee, *Small Cable Operators Worry About Life After Big Mergers*, The New York Times, Dec. 26, 2001 at C1.

⁷¹ *Eisner: We Aren't the Problem*, Multichannel News, July 30, 2001, *see also*, *When Rates Rise, Disney Shares Blame*, Multichannel News, Aug. 20, 2001.

Some programmers attempt to blame increased player salaries for increases in the affiliation fees for sports networks. This theory, to make sense, has to attribute to sports teams or leagues the power to set the broadcast or cablecast fees that networks pay. The true situation is far more complex. Obviously, team owners need money to pay player salaries. If player salaries increase, then team revenues have to increase to cover them in order to avoid eating into or potentially eliminating team margins. The rational team owner will not agree to pay salaries higher than the amount that the owner can derive from ticket and concession sales, the sale of telecast rights and other revenue sources. There are two possible paradigms. One is that the owners negotiate player salaries first and then attempt to recover all or a portion of the costs from programmers. That is risky, since there may be no programmer who is willing to pay the amount needed by the team owner. Another possibility is that the team owners place their telecast rights up for bids by competing programmers. At the end of the auction, they accept the highest bid for a contract that lasts for four or more years. Then, knowing the revenues from this source and estimating their revenues from all other sources, they set a budget for player salaries and negotiate within that budget. The second pattern seems to be the one that actually is followed. Programmers bid up prices, rather than simply responding to the prices set by the teams and leagues.

The main reason sports rights fees are so high is that the programmers drive them up through frantic and shortsighted feeding frenzies. According to the Wall Street Journal, since 1990, fees paid by the networks to televise the National Football League, National Basketball Association and Major League Baseball—by far the priciest leagues—have soared 133%, to more than \$3.5 billion per year.⁷² Television viewers and cable companies do not benefit in any way, shape or form when the media giants fight each other over sports rights and bid up the rights fees charged by teams and leagues, but they wind up paying the

⁷² “Household Rating” is the average audience viewing a network, station, or channel during a given time period, expressed as a percentage of all television households in the area measured.

⁷³ Stefan Fatsis, *NBC Sports Maps a Future Without Big Leagues*, Wall Street Journal, Jan. 30, 2003 at A1.

price. Cable customers do not really care whether their favorite sports events are carried by ESPN, Fox, TNT or some other network.⁷⁴ Programmers keep bidding outrageous amounts without any restraint because cable companies and their customers, rather than the programmers' own stockholders, will foot the bill.

For example, the NFL recently took bids for rights to broadcast its games. CBS, NBC, FOX and ABC/ESPN (both controlled by Disney) pursued the rights and drove the bidding up to astronomical amounts. ESPN, which won the right to cablecast games during prime time on Sundays, simply passed the increased costs along on to cable companies and, ultimately, cable subscribers.

A similar auction occurred in 2002 for National Basketball Association broadcast/cablecast rights. The winning bidders were ABC, ESPN and TNT (owned by Time Warner), who agreed to pay the NBA \$4.6 billion over the six-year life of the contract. TNT is now seeking a 10% annual rate increase for the service over five years, beginning in 2003 to cover its National Basketball Association contract.⁷⁵

⁷⁴ When Fox outbid CBS for NFL games in 1998, CBS's premier NFL broadcasting team of John Madden and Pat Summerall simply picked up and moved shop to Fox. Someone tuning into the first game broadcast by Fox would not have been able to determine that it was being shown on Fox, rather than CBS without looking at the channel display. Whenever one of the cable networks outbids a rival for sports rights after the rights fees have been bid up by hundreds of millions of dollars, it invariably launches a media blitz crowing about the victory, claiming that the fact that games that used to be found on one channel position would now be on a channel with a different number somehow benefits viewers. They also try to convince the cable operators that they too will somehow magically realize incredible benefits from the movement from one spot on the channel lineup to another. Whether or not viewers are convinced, cable operators are not, since they know that the crowing press releases will soon be followed by a notice of a massive rate increase. That, in fact, is the only consequence of any real significance from the bidding for sports rights—affiliation fees will rise and the cable operator will have to increase subscriber charges. Those increases usually come months after the bidding ended, and cable operators wind up with bearing the criticism, complaints and subscriber losses resulting from a process they do not control.

⁷⁵ *TNT Plus Negotiations Down to Wire*, Multichannel News, December 23, 2002.

Based on Mediacom's own experience, as well as reports in the trade press, annual increases in sports programming costs account for a disproportionate part of the increases in subscriber rates. That conclusion is supported by data in the Commission's 1999 Report on Cable Industry Prices, which asked the cable operators surveyed to estimate the percentage of their annual subscriber rate increases attributable to increased sports programming costs. Table 9 summarizes the responses.⁷⁶

TABLE 9: PERCENTAGE OF SUBSCRIBER RATE INCREASES ATTRIBUTED TO SPORTS PROGRAMMING COST INCREASES⁷⁷

	Competitive Group		Noncompetitive Group	
	Percentage of all Basic Cable Channels Represented by Satellite Sports Channels	Percentage of Annual Subscriber Rate Increase Attributed to Increased Sports Programming Costs	Percentage of all Basic Cable Channels Represented by Satellite Sports Channels	Percentage of Annual Subscriber Rate Increase Attributed to Increased Sports Programming Costs
July 1998	9.2%	11.8%	8.8%	13.5%
July 1999	9.8%	16.5%	8.4%	17.6%

2. Inflation Leads to Deflation and the Future Will Look a Lot Like the Past

For the past several years, both the market share of DBS and the prices charged cable companies by programmers have increased at rates well in excess of inflation. When it comes to programming costs, Mediacom and smaller cable operators are caught between the proverbial rock, which is the programmers' market power that results in large annual price increases, and the hard place, which is competition from DBS companies with lower programming and other costs that limits cable companies' ability to recover those increases. The gross margin compression described above is the result.

⁷⁶ The Commission has not included comparable data in its reports after the 1999 report.

⁷⁷ *In the matter of implementation of Section 3 of the Cable Television Consumer and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service and Equipment*, MM Docket No. 92-266, (1999), Report on Cable

There is no reason to believe that the situation will improve in the near future. In a conference call with the investment community on January 29, 2003, Time Warner disclosed that its programming costs for Time Warner Cable increased 21% in 2002, and forecast a percentage increase for 2003 in the “high teens.” According to press reports, ESPN is offering to limit its annual rate increase to 15% beginning in 2004, gradually reducing to an annual rate increase of 11% from 2008-2014 versus the 20% it has imposed for the past four years. Cable operators would have to commit to launch and carry through 2014 several new networks owned by ESPN. Of course, those new networks will not be free and so ESPN will recoup at least some of the money lost by limiting the annual rate of increases for the ESPN channels. By gaining control of even more channel space than is already occupied by the networks controlled by ESPN and its parent, Disney, and locking in long-term carriage, it will also gain advantages in dealing with advertisers and other benefits, such as new opportunities for repurposing programming and cross-promotion of all of the media, retail, theme park and other properties owned by Disney/ABC. Moreover, under these assumptions, the cost of ESPN would increase from today’s \$2.00 published rate to about \$4.42 by 2008, an increase of 121%.⁷⁸

Clearly, the current landscape of media concentration and market power is unacceptable. Slowing growth in multichannel video households, the high household penetration of many leading cable networks and the ongoing fragmentation of viewership and dilution of advertising dollars will continue to exert upward pressure on programming costs and cable rates as media giants wielding undue influence and market power seek to sustain their growth by forcing cable operators to sign long-term contracts locking in exorbitant annual price increases for the entire term, regardless of changes in ratings or other circumstances. Any regulatory changes that would further increase media concentration would only exacerbate the situation.

Industry Prices, FCC 00-214, Table 10 and Attachment B-8 (“*1999 Cable Industry Price Report*”).

C. THE MEDIA GIANTS ENGAGE IN PRACTICES THAT ARE UNFAIR, DISCRIMINATORY AND CONTRARY TO THE INTERESTS OF CONSUMERS

As indicated, cable operators distribute cable networks to their subscribers under contracts—commonly called “affiliation agreements”—with the owners of the networks. Affiliation agreements usually are individually negotiated by the programmer with each significant MSO or the National Cable Television Cooperative, Inc. (“NCTC”) on behalf of its members.⁷⁹

The duration of affiliation agreements varies, but typically ranges from four to seven years. There are certain practices followed by most basic cable networks controlled by the Big Six in negotiating affiliation agreements that contribute to rising programming costs and ultimately are harmful to competition, diversity and localism. The most relevant are the following:

1. Volume Discounts and Launch Support

There is a wide disparity between the prices paid by the various MSOs, the NCTC and DBS operators and, in the end, consumers for cable networks. That disparity results primarily from the practice of programmers of granting economic benefits to the largest distributors, who therefore pay lower monthly affiliation fees than smaller operators. These benefits include “volume discounts” to rate card prices, “launch support” in the form of a cash payment per subscriber in each new system in which a network is launched or other benefits that lower the net effective rates of the large MSOs and the DBS companies. Mediacom and smaller operators cannot obtain the same discounts or benefits, even when they purchase programming through the NCTC. NCTC officials believe their organization does not always receive discounts comparable to those given to MSOs or DBS companies that distribute a cable network to a comparable number of subscribers.

⁷⁸ *ESPN Eyes New Long-Term Pacts*, Multichannel News, January 6, 2003.

As a result, independent cable companies pay, by some estimates, anywhere from 5% to 30% more for programming than the largest MSOs and DBS companies. Frank Hughes, Senior Vice President of Programming for the NCTC, recently stated that the majority of the NCTC's member companies pay a much higher percentage of their operating costs toward programming than the larger MSOs. He estimated that programming costs for many smaller cable companies represent 35% to 45% of their budgets, while those costs for most large MSO's are in the 20% range.⁸⁰

Moreover, as the giant MSOs and the two DBS companies grow even larger, they may gain even greater economic concessions. One of Comcast's senior officers recently stated that the merger of Comcast with AT&T Broadband is expected to save the merged company \$250 million to \$450 million a year in programming costs. Those savings would occur because the combined company will obtain the benefits of the best rate of either Comcast or AT&T Broadband under its existing programming agreements. In addition, as contracts are renewed, the combined company expects to be able to achieve higher volume discounts and other benefits because of its size.⁸¹ According to Mr. Hughes of the NCTC, programmers may look for even higher increases in license fees from other cable operators in order to recoup any savings or additional benefits realized by Comcast.⁸²

2. Discrimination in Applying Volume Discounts and Support

Mediacom believes that some programmers may not offer volume discounts, launch or marketing support or other economic benefits on a fair and non-discriminatory basis. For example, for some networks, the NCTC receives lower discounts than, and is not offered

⁷⁹ The NCTC is a cooperative programming purchasing association of hundreds of cable companies that collectively serve over twelve million subscribers. Most of the members of the ACA are also members of the NCTC.

⁸⁰ *Co-op's Frank Hughes, the Little Op's Pal*, Multichannel News, July 23, 2001 ("Hughes Article").

⁸¹ Declaration of Robert Pick, *In re Applications of Application for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, dated Feb. 27, 2002.

⁸² *Hughes Article, supra*.

other economic benefits enjoyed by, some MSOs that produce equivalent or lower volumes. In addition, the standard terms offered by many programmers prevent an MSO from passing through its rates or other terms to systems in which it does not have a specified equity interest plus general management control. Mediacom believes that there are cases in which some programmers have knowingly permitted an affiliated or favored unaffiliated MSO to extend its lower rates to cable systems in which it does not really have the requisite ownership interest and which it does not actually manage. Sometimes, the arrangements constructed in order to make it appear that the smaller system operator meets a programmer's standards for receiving the large MSO's terms are convoluted and creative, but examination reveals that the smaller operator is in reality an independent company that does not qualify for the discounted rates under the network's supposedly "standard" terms.

In the summer of 2001, subsidiaries of Mediacom acquired cable systems from AT&T Broadband that more than doubled the number of subscribers served by the systems owned by Mediacom's subsidiaries (the "Broadband Acquisition"). Since then, Mediacom's principal subsidiaries have been attempting to negotiate definitive agreements for continued carriage on the acquired systems of a number of programming services on fair terms that give proper recognition to the aggregate number of subscribers served by all Mediacom systems. In the years before the acquisition, programmers attempted to justify the high fees charged to Mediacom by pointing to its small size as not justifying larger discounts, but now that Mediacom has grown into the eighth largest MSO, some programmers apparently expect it to continue paying at the exorbitant rates reflecting volume discounts for a company half its current size.

3. Rates Go Up as Ratings Go Down

Programmers adamantly refuse to tie the monthly license fees they charge cable operators, or the annual increases in their rates, to the popularity of their networks. As a result, fees increase annually even for networks whose ratings decline. For example, according to Business Week Online, the number of men 18 to 49 years old (the key target

audience for sports programming advertisers) watching ESPN declined by approximately 10% from September 1998 to September 2001, while the average per-subscriber rate charged cable operators increased by around 50%.⁸³ In a study comparing the fees charged by networks to their relative viewer ratings, Paul Kagan Associates reported that ESPN, ESPN2 and TNT are most costly relative to ratings.⁸⁴ Furthermore, between 2000 and 2001, the ratings for 18, or 55%, of the top 33 basic cable networks declined,⁸⁵ while the cost of every one of those networks increased.

4. Most Favored Nation (“MFN”) Provisions

In simple terms, an MFN ensures that a particular MSO does not pay a higher price than another MSO. An MFN may be prospective only—that is, it provides that if, during the term of the affiliation agreement with the MSO, the programmer offers a lower net effective rate or more favorable terms to another MSO of the same size or smaller (in terms of number of subscribers), then the protected MSO will receive the benefit of the lower rate or better terms. It may also provide assurance that there is no other MSO that has already been granted a better rate or terms than the protected MSO.

If a programmer negotiating with a particular MSO has already granted MFN treatment to larger MSOs, then that fact may enhance the ability of the programmer to resist efforts to negotiate a lower rate. The programmer claims that the lower rate will trigger MFN price reductions in multiple contracts with larger operators, resulting in a loss of revenues that is disproportionately large compared to the value that the MSO with which it is negotiating represents. Some industry participants believe that that programmers intentionally use MFNs granted to some MSOs as a tool for reducing the ability of other MSOs or the NCTC to negotiate lower rates.

⁸³ Business Week online, Feb. 11, 2002, available at http://www.businessweek.com/magazine/content/02_06/b3769072.htm.

⁸⁴ Harry Berokowitz, *Newsday*, Apr. 11, 2002, at A16.

⁸⁵ *Kagan 2002-2003*, *supra* note 41, at 32.

The belief is that a programmer will negotiate a deal with the dominant MSO within each band of subscriber size and include an MFN. It then negotiates with other MSOs within that band, and argues that because of the MFN it granted to the first MSO, the price agreed to by the first MSO is a floor below which the programmer cannot go in price negotiations with other MSOs. This practice is especially objectionable when a programmer uses MFNs to protect non-arm's length terms extended to an affiliated MSO or a smaller MSO that enjoys the affiliated MSO's rates because of one of the artificial arrangements referred to above.

5. Tie-Ins of Networks by Programmers

Some programmers use their market power to force cable companies to carry weak or unwanted networks. They do not, however, directly "tie" their networks in a way that would obviously violate antitrust laws. They achieve their goal through more subtle means, such as offering discounts to the rate paid for the popular network if the operator also commits to carry the weaker networks. To avoid an overt violation of the antitrust laws, they state that they are prepared to permit an operator to carry only the popular network; however, the rate they quote for stand-alone carriage is at such a high level that it is uneconomical.

For example, during recent negotiations, one major programmer offered Mediacom prices and terms for carriage of several networks controlled by the programmer, one of which was a "strong" network in terms of viewer loyalty and the others of which were "weak" in terms of both audience share and viewer loyalty. The total cost for all of the networks over the proposed contract term was too high, in Mediacom's opinion, and Mediacom also objected to the proposed annual rate increases for the "strong" network that were in the double digits. Mediacom informed the programmer that it would be willing to carry all of the services and pay the requested rates, or even more, as well as accept the proposed annual rate increases, if Mediacom could offer the "strong" network on an a la carte basis. The programmer told Mediacom that a la carte carriage would not be permitted

at any price. Mediacom then requested the programmer to present a proposal for carriage of the “strong” network only. Mediacom fully expected that the rate for the strong network would be higher if it were carried on a stand-alone basis, but also quite reasonably expected that the overall contract cost for the single network would nonetheless be lower than the cost for carriage of several networks. Amazingly, the programmer’s proposal for carriage of only the strong network raised the percentage for future annual increases, which was already in the double digits, by a full 50%, and the potential overall contract cost for carriage of the single network was millions of dollars higher than that for carriage of all of the networks. Throughout the negotiations, the programmers’ representatives, even those who were not lawyers, appeared to be well-coached on antitrust law as it applies to tying of services and sought to achieve the same result as a formal tying arrangement by making the purchase of the strong network on an unbundled basis economically prohibitive.

Some programmers also refuse to permit an operator to carry one of the programmer’s weaker services unless the operator also carries the “stronger” network.⁸⁶ This makes it more difficult for an operator to offer cheaper programming that is a closer substitute for the more expensive programming owned by a programmer if they want to be able to carry popular programming at economic prices or at all. Media companies that own cable networks as well as broadcast stations condition the grant of retransmission consents for the broadcast stations upon carriage by the operator of cable networks.

6. Programmers Dictate Tier Placement and Refuse A La Carte Carriage

Most programmers attempt to control the tier on which their networks are carried by a cable operator. In some cases, they simply require that the network be placed on a specified tier—typically for analog services, the “most widely penetrated” tier above the basic service tier, meaning the tier of service that is received by the largest number of

subscribers after basic. In other cases, they condition the availability of rate discounts on penetration—the more widely penetrated the network is, the lower the rate. As a practical matter, owners of analog basic networks make the financial penalty for carriage on any tier except expanded basic so large as to effectively eliminate that option.

Programmers often force cable operators to agree to pay license fees based on a specified (and usually very high) percentage penetration of all basic subscribers. As a result of competition from DBS, some cable subscribers in systems serving markets where DBS does not offer local broadcast channels will retain basic cable service (which includes local broadcast stations), but drop expanded basic in favor of one of the packages offered by DBS. A minimum penetration commitment for a network based on total basic subscribers may mean that the cable operator has to continue to pay for that subscriber, even though he or she no longer buys the expanded basic tier on which that network is located. The result is that the programmer gets paid twice for the same subscriber—once by the DBS company and again by the cable operator.

As a result of the requirement that a network be carried on the most widely penetrated tier after basic, the cable operator has to pay a license fee for every one of its subscribers to that tier. To cover that expense, the operator has to charge all of those subscribers for the network, even those who do not view or want the network. If a relatively expensive network could be offered on an individual or “a la carte” basis, only subscribers who want it would have to pay for the network. For example, subscribers who have no preference for sports in general would not be compelled to pay for a sports network as part of their expanded basic cable service or see their monthly bills increase annually to cover the double-digit rate increases imposed by some sports services. Many programmers, however, adamantly refuse to permit operators to offer networks on an a la carte basis. For example, most sports programmers categorically refuse to permit a la carte carriage.

⁸⁶ One programmer, for example, told Mediacom during recent negotiations that it will not,

on any terms, permit operators to carry any of its weaker networks unless the operator also agrees to carry its strongest network.

These practices severely restrict the ability of cable operators to package their services in the way that they believe best suits their business needs and the interests of their customers. Mediacom, like others in the cable industry, believes that the offering of cable television programming in a limited number of discrete bundles or tiers is economically efficient and in the interests of consumers because having numerous tiers of service or totally “a la carte” programming would increase costs and, therefore, raise cable rates.⁸⁷ These conclusions are supported by a 1998 industry-sponsored study,⁸⁸ and a panel of experts engaged by the General Accounting Office in connection with its study of the impact of sports programming costs on cable rates agreed that “the bundling of cable programming, to at least some extent, results in economic efficiencies and thereby helps in minimizing cable rate increases.”⁸⁹ Nonetheless, greater choice and decisions about the way in which programming is bundled and offered should be left to cable operators, taking into account the varying needs and interests of the different communities served, rather than programmers whose business interests are not aligned with the needs of local communities.

Cable customers often complain about being “forced” to subscribe to, and pay for, packages of 40 or more channels that include many networks that they simply do not watch or want. As usual, those complaints are directed toward cable operators, and not to the programmers who are really responsible for the terms of carriage. As a result of networks’ insistence on carriage on the expanded basic tier (or the imposition of a severe financial penalty for carriage on any other tier) and refusal to permit a la carte carriage, the cable operator lacks the ability to offer the greater range of package choices that many consumers desire.

⁸⁷ Among other things, all subscribers would have to pay additional costs associated with the greater levels of customer support and technical staff and the equipment needed to prevent unauthorized subscribers from viewing them. In addition, unbundling, if carried to an extreme, would lead to fewer subscribers receiving many networks, which would decrease the programmers’ advertising revenues and, therefore, lead to higher rates charged to cable companies that would have to be passed through to subscribers.

⁸⁸ Economists Incorporated, *How Bundling Cable Networks Benefits Consumers* (1998).

⁸⁹ *GAO Report, supra* note 48, at 16.

Recently, Commissioner Martin urged cable and DBS operators to offer “an exclusively family-friendly programming package as an expanded tier” so that “subscribers who are interested only in programming they can enjoy with their family would finally have a way to purchase only that programming.” As an alternative, he suggested that “cable and DBS operators could offer programming in a more a la carte fashion” so that parents could have more options in choosing family-friendly programming.⁹⁰ The reality is that the programmers practices mean that cable companies cannot offer a family or other “special interest” packages of limited numbers of channels or offer high-priced programming services like the sports networks on an a la carte basis without violating their affiliation agreements or incurring additional costs that eventually have to be passed on to consumers. Mediacom respectfully suggests that rather than urging cable companies to offer family-friendly packages, Commissioner Martin should be encouraging the programmers to give cable operators the freedom to do so.

These practices also reduce programming diversity and create barriers to entry by new programming services not controlled by the giant media companies. There is only so much available bandwidth within a given cable system, and the requirement that multiple networks controlled by the conglomerates be placed on the expanded basic tier reduces the channels on that tier available for new networks or networks not owned by the giant media companies. Indeed, programmers whose networks are reasonably priced are beginning to be squeezed out of the budgets and channel lineups of cable operators. As a result, even some programming executives are beginning to joining the call by the ACA for legislation that would require the owners of any network to permit a la carte carriage.⁹¹

⁹⁰ Kevin J. Martin, Address at Family Programming Forum, Annual Conference of National Association of Television Programming Executives (Jan. 22, 2003)(transcript available at <http://www.fcc.gov/Speeches/Martin/2003/spkjm301.pdf>).

⁹¹ *Small Ops Ready to Rumble*, Multichannel News, August 5, 2002.

7. Use of the Retransmission Consent Process to Secure Carriage of Affiliated Cable Networks

The 1992 Cable Act prohibits cable operators and other MVPDs from retransmitting the signal of any commercial television station⁹² without its prior consent. The “must carry” right allows a broadcaster located within the same DMA as a cable system and that meets certain other requirements to demand carriage of the station’s signal on the cable system.⁹³ Every three years, commercial television stations must elect between asserting (or “defaulting” to) their must-carry rights or seek carriage based on retransmission consent. A broadcaster cannot demand monetary or other compensation for carriage under a “must-carry” election. Requiring the cable operator to obtain a retransmission consent, rather than relying on the must-carry right, allows the station owner to seek to negotiate consideration for retransmission, but the cable operator is under no obligation to carry the station if agreement is not reached after good faith negotiations. Even if not legally required to carry the signals of broadcast stations that choose retransmission consent, cable systems invariably carry those signals because they offer popular programs, particularly if they are affiliates of the national broadcast networks.

Many of the local broadcast television stations in the country are owned and operated by the national broadcast networks, ABC, CBS, Fox, NBC, UPN and WB (“O&O Stations”). Others are independent local stations, many of which are affiliates of the national networks. Of the more than 845 local broadcast stations carried by Mediacom systems, 31 are O&O Stations. All of the national broadcast networks and their respective O&O Stations are owned by five of the Big Six.

⁹² Retransmission consent rights are restricted to commercial television stations. Noncommercial television stations do not have retransmission consent rights. 47 U.S.C. §325(b).

⁹³ 47 U.S.C. §534(b).

As noted in the Ninth Annual Report, those five media companies also own or have interests in more than 113 cable networks.⁹⁴ Cross-ownership of O&O Stations and cable networks has turned the retransmission consent process, which Congress intended to be conducted through negotiations, into a process conducted by dictation by the broadcast networks, or their affiliated cable networks acting as their proxies, as they pursue the national corporate and programming strategies of their conglomerate parent companies. Those strategies include leveraging their O&O Stations to maximize distribution of and revenues from their cable networks.

The retransmission consent practices of the four media giants that own the national broadcast networks have been described in the comments filed in this proceeding by Cox Enterprises, Inc. (the “Cox Comments”)⁹⁵ and in the ACA’s *Petition for Inquiry into Retransmission Consent Practices* (the “ACA Petition”).⁹⁶ Those practices are best summarized in the following paragraph from the Cox Comments:

The networks' broad and steadily increasing ownership reach has allowed them to force unwanted programming and higher costs on cable operators and their customers, thereby reducing the responsiveness of cable operators' programming decisions to local communities and driving up local cable rates. Congress and the Commission established the retransmission consent process to preserve local broadcast service to the community - specifically, to maintain the competitive position of local broadcast voices against vertically-integrated cable operators in local markets. Today, however, the vertically-integrated networks' ability to leverage the retransmission consent process is undermining the localism principle that is at the heart of the statutory scheme. The networks' extensive ownership interests in both broadcast stations and cable channels, coupled with their increasingly national and cross-platform focus, have converted the retransmission consent process into the prime tool for implementing the networks' new national distribution and marketing strategies. The networks now negotiate retransmission consent for all of their O&Os nationwide at the same time, and condition such consent on carriage

⁹⁴ *Ninth Annual Report, supra* at note 16, Attachment 1.

⁹⁵ Matter of 2002 Biennial Regulatory Review, MB Docket No. 02-277, Comments of Cox Enterprises Inc., (“Cox Comments”).

⁹⁶ American Cable Association Petition for Inquiry into Retransmission Consent Practices, *In the Matter of Petition for Inquiring into Retransmission Consent Practices*, (filed Oct. 1, 2002).

of their affiliated cable programming on all of the cable operator's systems nationwide (not just where the cable system and the O&O share a market). Consequently, retransmission negotiations no longer are based on the value of the broadcast station to the local market. Nor is the negotiation for the carriage and pricing of the network's affiliated cable programming based on its value to the local cable audience.⁹⁷

The Cox Comments and the ACA Petition contain numerous specific examples of the problematic use of the retransmission consent process by the broadcast networks.⁹⁸ Mediacom has had similar experiences, and we would be happy to provide the Commission with specific examples if requested. As the Cox Comments and the ACA Petition explain, broadcast networks have conditioned retransmission consents upon commitments to carry, and pay license fees for, their affiliated cable networks throughout all of Mediacom's systems, not just those that serve the same market as a particular O&O Station. In many cases, the cable networks that are tied to retransmission consents are not widely viewed and would not be carried on their own merits. While this process is repeated every three years as retransmission consents expire, the commitments for carriage of the tied cable networks required by the networks are usually for longer than three years. As a result, having securely locked up carriage of the cable networks that were tied to the last cycle's retransmission consent, the media giants are able to play the game all over again at the start of the next cycle by conditioning the renewal of the consent to launch of new cable networks developed during the intervening three-year period.

⁹⁷ *Cox Comments* at 42.

⁹⁸ While the focus of Mediacom's comments are on the practices of the media companies that own the national broadcast networks, there are other companies that control multiple local broadcast stations and also have interests in cable networks, but do not have equity interests in the national broadcast networks. Those companies include Cox Enterprises, Inc., itself. Mediacom generally agrees with the Cox Comments insofar as they relate to the national broadcast networks and agrees with the ACA that abuses of the retransmission consent process are committed by station group owners other than the broadcast networks. Mediacom is not, however, expressing any opinion in these comments as to the manner in which Cox Enterprises, Inc. conducts the retransmission consent process for the broadcast stations it owns and operates.

These tying arrangements harm smaller cable companies, their customers and independent cable programmers. Cable systems have to pay for the cable networks they are forced to carry as a condition to obtaining retransmission consents, and the costs have to be either passed along to consumers or absorbed by the cable operator. The requirement that even more channel space be given to the media conglomerates for their weak cable networks limits the ability of cable systems to make programming choices that are right for their local systems. It also reduces the channel space and money available for carriage of independent cable programming networks.

8. Repurposing and Fragmentation

One way in which the big media companies seek to increase their affiliation and advertising revenues is to launch new cable networks and use their market power to force carriage by cable companies. In many cases, the new networks lack sufficient original or otherwise compelling programming to fill the programming day, and have no reason for being other than to put money into the pockets of the media conglomerates. In some cases, programmers resort to recycling the programming from their affiliated broadcast networks or their more established cable channels. The Cox Comments describe, in detail and very effectively, the manner in which the broadcast networks “leverage their web of ownership interests to increase their profits” by “repurposing,” network programming on their affiliated cable networks.⁹⁹

In other cases, programmers fill new channels they force upon cable companies by “fragmenting” or “cloning” their more established cable networks, rather than “repurposing” broadcast fare. Often, that practice results in dilution of the viewership of the original network. For example, Discovery Channel, Inc. (“Discovery”), in which Liberty Media has an equity interest, began with a single cable network, The Discovery Channel, which historically garnered relatively high ratings and attracted loyal viewers with demographics

valued by advertisers. In an effort to gain more affiliation fees and advertising dollars, Discovery has acquired or created four new analog basic cable networks, Animal Planet, the Health Network, The Learning Channel, and the Travel Channel, and seven digital networks.¹⁰⁰ Much of the programming on these channels is of the same kinds or themes as programs that used to appear exclusively on The Discovery Channel. As a result, The Discovery Channel's ratings have declined, as viewers who are most interested in programs with a specific theme (e.g., health, aviation or wildlife) now have whole channels devoted to their special interests and so no longer or less frequently tune into The Discovery Channel.

One effect of repurposing and fragmentation is declining ratings for cable channels. As noted, programmers never reduce their affiliation fees or forego rate increases because of declining ratings. Instead, they increase their license fees in order to recoup lost advertising revenues. The result of these practices is that cable companies are forced to launch and carry, and all subscribers are forced to pay for, new networks that offer programming of limited appeal and at the same time have to continue to carry the cannibalized network without any price reduction to reflect the loss of viewers to the new channels.

9. Programmers Use Sports Programming to Lock-In Distribution of Weak Networks

Some programmers who operate sports networks use their telecast rights for popular sports events to protect their weaker non-sports networks. Instead of developing more appealing programs to increase a network's appeal, the programmer may protect a weak channel from being dropped by cable companies by placing popular sports events on the channel, even though its programming is supposed to be general or family entertainment or some other theme besides sports.

⁹⁹ *Cox Comments*, at 28, citing Letter from Alex Wallau, President, ABC Television Network, to ABC Affiliates (Oct. 3, 2002) at 4.

¹⁰⁰ BBC America, Discovery Civilization, Discovery Health, Discovery Kids, Discovery Wings, The Science Channel and Discovery Home and Leisure.

For example, during the 2002 baseball playoffs, ABC, which held broadcast rights for some of the playoff games, showed some of the games on ABC Family Channel, which is supposed to offer movies, series and other programming that is “family” oriented. NBC has cablecast Olympic events on its basic cable services, CNBC and MSNBC. Fox owns Speed Channel, which is devoted to NASCAR and other programming relating to automobile racing. Nonetheless, Fox regularly runs NASCAR events on its FX channel, which is supposed to be a general entertainment network.

10. Nondisclosure Agreements

Traditionally, broadcast television has been free over the air and broadcasters make money from selling advertising, rather than charging viewers.¹⁰¹ As a result, many viewers seem to assume that cable television works the same way. Apparently, some viewers think that their cable company owns the programming channels it distributes; they see lots of advertising on those channels; they think that the cable company is earning all of those advertising dollars; and they resent the fact that the cable company also charges them a monthly subscription fee. Consumers, in other words, may not fully understand that it is the Big Six who own most of the networks, sell the vast bulk of the advertising and earn billions more from cable operators by charging license fees.

They also do not recognize that it is some of the programmers, not their local cable systems, that force them to buy the expensive or less popular channels or that programming cost increases are the single biggest contributor to rising cable rates. As a consequence, it is the cable companies, not the programmers, who bear the burden of customer complaints,

¹⁰¹ This tradition may owe more to the impracticality of charging viewers who receive broadcast television over the air than to an exercise of altruism or civic responsibility by the broadcasters. The latest round of retransmission consent negotiations has seen more effort on the part of local broadcast stations and station groups who do not own cable networks to charge cable companies per-subscriber fees in exchange for retransmission consent. The fact that subscribers would ultimately have to pay those fees does not seem to trouble the broadcasters.

criticism by state and local officials and loss of business resulting from the programmers' pricing and other practices.

An important reason for this lack of understanding is that programmers do not want consumers to know the facts. Typically, programmers insist on including in affiliation agreements confidentiality provisions that prohibit the operator from disclosing the license fees it pays or the other terms of its affiliation agreement to anyone. Thus, the programmers' rate increases and "bundling" practices are kept hidden from the public and even from federal, state and local policymakers and officials. Moreover, the confidentiality clauses mean that it is difficult, if not impossible, for any given cable operator to determine the programmers "real" prices or to negotiate a rate that is fair in relation to the rates charged to other operators.

Some broadcast networks and their affiliated companies who have filed comments in the proceeding that urge the elimination or relaxation of the Broadcast Cap are apparently big proponents of fair competition and free markets, at least when that serves the interest of increasing their own power to compete unfairly and dominate markets. Use of confidentiality provisions to block access by buyers of programming to crucial information is completely inconsistent with the notion of an open and fully competitive marketplace for video programming. Mediacom, therefore, respectfully requests that the Commission ask the companies that own the broadcast networks to back their words with action by sharing that information with the public, forswearing future use of confidentiality provisions in their affiliation agreements and waiving those provisions in existing agreements so that cable companies can better communicate with their customers and franchise authorities.

11. No-Delete Clauses and Long, Fixed Contract Term

Most affiliation agreements are for terms of four years or more, and the cable operator has no right of early termination. In addition, the agreements provide that once a network is launched in a system, it may not be dropped. Accordingly, cable operators

cannot rearrange their channel lineups to reflect changes in consumer preferences, business developments or other factors. For example, even if a network's ratings decline or it loses a bid for renewal of sportscasting rights, changes the fundamental nature or theme of its programming, dilutes its viewership through repurposing or creation of spin-off networks, or simply loads up its schedule with infomercials, the cable operator has to continue to carry the network and customers must continue to receive and pay for it, whether they like it or not.

12. Sales of Cable Systems

As already mentioned, Mediacom has grown rapidly since its formation, primarily by acquiring neglected cable systems from much larger MSOs. If one MSO sells a system to another MSO, its affiliation agreements typically prohibit assignment to the buyer or otherwise prevent pricing and other terms from being passed through to the buyer. This can produce huge "windfalls" for programmers when a large MSO sells systems to a smaller MSO because the volume discount enjoyed by the seller cannot be passed through to the buyer. Nothing of substance has changed from the programmer's perspective as a result of the sale. Its network continues to be delivered to customers of the sold system, and the programmer's costs of delivering its network do not increase because the same satellite signal continues to be received by the same system headend. Yet, the programmer gets to charge a higher fee. Moreover, it ultimately increases the rates paid by customers served by the system, since the new owner will eventually have to pass all or part of its higher programming costs through to customers.

As noted, Mediacom has spent over one billion dollars in capital expenditures to upgrade and support cable systems that it acquired from big MSOs who might never have invested the necessary capital for upgrades because they had adopted strategies focused on clustering of systems in larger markets. Those upgrades have increased channel capacity, giving programmers the opportunity for new launches of their networks that would not have been available if our acquired systems had remained in the hands of their former owners.

Many programmers simply refuse to take those launches into account in negotiating carriage terms for the acquired systems. Mediacom's subscribers, who ultimately pay the programmer for the newly launched networks and who are the reason the programmer gains advertising revenues from the expanded subscriber base for those networks, do not get credit for the value that they bring to the programmer.

Mediacom has in the past acquired systems from much larger MSOs, so programmers have received a "windfall" from our acquisitions because Mediacom's programming rates are higher than those paid by the larger MSOs from which we acquired the systems. Mediacom's growth has produced major benefits and opportunities for programmers, and all Mediacom asks in return is that we be charged fair rates that take into account the added value our acquisitions produce for programmers.

13. Systems Acquired from Vertically Integrated MSOs Are Subject to Non-Arm's-Length Terms

Large MSOs that are vertically integrated with programmers agree to rates, launch, carriage and penetration commitments and other terms that are not based on arm's length negotiations. For example, an MSO with an equity interest in a programmer will often "load" the expanded basic tier in all of its systems with all of the networks offered by the affiliated programmer. Mediacom believes that this occurred in the systems it acquired in the AT&T Broadband Acquisition, which were "loaded" with networks in which Liberty Media, then owned by AT&T Corp., had equity interests. An MSO's financial interest in the programmer makes it a matter of blatant self-interest to assure the broadest possible distribution of the networks. If a smaller operator without a similar equity interest in the programmer acquires systems from a vertically integrated programmer, it is stuck with programming decisions that make no economic sense for it because dropping networks produces subscriber and franchise authority complaints.

14. Side Deals with Large MSOs

While programmers refuse to make the terms of their deals public, it is speculated that some programmers induce large MSOs to agree to rates that are higher than the market would otherwise dictate by entering into undisclosed “side” deals with the MSO that compensate it for the “extra” costs of the affiliation agreement. The net cost to the MSO is below that which is apparent from the terms of the affiliation agreement only. The programmer then uses the rate or other terms agreed to by the large MSO as the base for the deals it will strike with the rest of the industry—smaller MSOs wind up paying more than the base rate. This tactic allows the programmer to artificially inflate its revenues at the cost of the smaller operators.

15. Roadblocks to Digitization of Analog Signals

While Mediacom has built the necessary infrastructure and anticipates that the cost of digital television receivers and set-top boxes will fall, it is concerned that the media conglomerates will prove to be a major impediment to Mediacom’s ability to give all of its customers the choice of receiving digital television service. As the cost of digital converters drops and broadcasters transition from analog to digital signals and expand HDTV offerings, it may prove beneficial to both cable operators and their subscribers to install a digital set-top box in every subscribers home, much like the competing DBS operators. Among other things, that would permit networks that are currently distributed in analog format to be digitized and compressed, freeing up bandwidth for new channels or advanced broadband services and allow consumers with the appropriate television receivers to enjoy the enhanced viewing experience of digital television and HDTV.

During Mediacom’s discussions with a major cable network conducted just a few weeks ago, the possibility of digitization of the network’s analog signal was raised. The network took the position that its standard affiliation agreement does not permit a cable company to digitize the signal without the network’s consent. Representatives of the network stated that consent to digitize would carry a price, even though Mediacom offered to guarantee that the signal conversion would not degrade signal quality, reduce the number

of subscribers receiving the network or otherwise adversely affect the programmer. Among other things, the network indicated that its position for requests of this kind by cable companies was under development, but probably would require the cable operator to dedicate some of the bandwidth saved through digitization to the launch and carriage of additional cable networks controlled by its parent company, which is one of the Big Six. The network also insisted on other conditions to digitization designed to protect its own competitive position, but that would have the effect of delaying and increasing the cost of the transition to digital television. Mediacom suspects that other networks will take similar positions.

As noted, the tying and retransmission consent practices of the media conglomerates already force Mediacom to carry, and its customers to pay for, unwanted networks. If consents for digitization of analog networks are required, the programmers' leverage will be vastly increased, to the detriment and at the cost of cable companies, consumers and independent programming networks. Moreover, the digital television and HDTV transition that Chairman Powell has sought to boost with his voluntary plan for the cable industry will be delayed and made more expensive for consumers.

III. THE EFFECTS OF MEDIA CONSOLIDATION ON INDEPENDENT CABLE COMPANIES, THEIR SUBSCRIBERS AND THE PUBLIC INTEREST

Some of the commentators who are opposed to further media consolidation think of the cable industry as part of the problem.¹⁰² In numerous prior Commission proceedings, in testimony before Congress and in other public forums, many individuals and groups have railed against alleged abuses by cable companies of their purported "monopoly power." Almost invariably, the focus is on the giant vertically integrated MSOs, and little or no recognition is given to the fact that the cable industry is not solely comprised of those companies. Critics of the industry find it to their advantage to characterize "cable" as an undifferentiated group of local monopolists.

The basic premise underlying adoption of the 1992 Cable Act was “that the cable industry had gained such economic power that it was preventing other media, and programmers not able to obtain access to cable systems, from competing effectively for viewers and advertisers.”¹⁰³ The 1992 Cable Act declared cable to be the “dominant” system for distribution of television programming and to enjoy local monopolies.¹⁰⁴ Congress also cited increased vertical and horizontal concentration within the industry that created impediments and threats for broadcasters and non-integrated cable programmers. Cable companies, it was asserted, could dictate terms to programmers and consumers alike, because there were no acceptable alternatives. The “bottlenecks” created by cable companies harmed independent programmers and, ultimately, consumers.¹⁰⁵ Congress included in the 1992 Cable Act numerous provisions designed to protect programmers from the alleged monopoly power of cable companies and to prevent cable companies from impeding development of alternative distribution methods and to encourage that development.¹⁰⁶

Whether or not that picture was accurate in 1992 or remains accurate today can be debated. Even if it were assumed to be valid today for the biggest MSOs, it certainly is not true of Mediacom and the other members of the ACA, who are not vertically integrated, face intense competition from the two much larger national DBS companies and account for less than 2% of the market for distribution of multichannel video programming, in the case of Mediacom, and nine one-thousandths, of one percent of that market, in the case of the average ACA member.

¹⁰² Consumer Federation of America and Consumers Union are notable examples.

¹⁰³ James Goodale, *All About Cable*, at 1-28 (2002).

¹⁰⁴ Pub.L. No. 102-385§2(a)(3).

¹⁰⁵ *Id.* at §§2(a)(2)(4)(5). *See generally id.* at 1-28; Pub.L. No. 102-385 §§ 2(a)(2), (4) & (5).

¹⁰⁶ *Id.* at 1-26.

Frankly, the notion that Uvision, an ACA member serving 8,300 customers in rural Oregon,¹⁰⁷ or even Mediacom, has sufficient market power to dictate terms or represents a threat to the multinational media giants that dominate broadcast and cable programming is ludicrous. The reality is that the cable industry is not monolithic (nor, we submit, monopolistic), and it includes companies like Mediacom and other ACA members who provide cable television and advanced broadband services to millions of Americans in rural areas and small communities in all 50 states and who operate in circumstances radically different from, and do not possess anything near the market power of, either the giant programming conglomerates or large vertically integrated MSOs.

Another reality is that Mediacom and the other members of the ACA face effective and growing competition from the two national DBS companies, which are now, in terms of number of subscribers, at least 5 times bigger than Mediacom and 1,000 times bigger than the average ACA member. There is absolutely no danger that Uvision or other ACA members will impede the development of satellite service as a competitive alternative, but a very great danger that the combined effects of competition from DBS, with its legal, regulatory and programming cost advantages, and the greed of some programmers, with their discriminatory pricing and refusal to give cable systems and their customers freedom of choice, will force more small ACA members to close their doors or sell to bigger MSOs.

It is sometimes difficult to remember that there once was a time when ABC, CBS and NBC were the only broadcast networks. In those days, before the consolidation that has

¹⁰⁷ See Prepared Testimony of Neal Schnog, President of Uvision, before the hearings on the Status of Competition in the Multi-Channel Video Programming Distribution Marketplace held by the House Subcommittee on Telecommunications and the Internet on Dec. 4, 2001 available at <http://energycommerce.house.gov/107/hearings/12042001Hearing433/Schnog740.htm>. Mr. Schnog's testimony is an informative statement of the perspective of a very small, rural cable system operator on the impact on small system operators of the market power of programmers and the emergence of DBS as an effective competitor. Among other less hyperbolic remarks, Mr. Schnog refers to programmers as "America's own OPEC—the Organization of Programming Extorting Companies."

created the Big Six and when the media industry was divided among at least 50 separate companies, each of those three networks was perceived as a media giant in its own right, but their dominance and power were confined to the broadcast television and radio markets. In 1984, although ABC was the most integrated network, it still had interests in only twelve television stations, four cable networks, and a film production company. CBS had five owned and operated television stations, owned Tri-Star Pictures and had interests in only two national cable networks and a minority interest in a single regional sports network. NBC owned and operated seven television stations and had relatively insignificant cable interests. The Fox, UPN and WB networks did not yet exist.

Of course, those days are long gone. While ABC, CBS and NBC are still dominant, the Fox, UPN and WB networks have emerged, and all six networks are now only pieces of a handful of huge, multinational conglomerates whose reach and market power extend to virtually all segments of the media industry, including cable programming. As the Commission recognized in the *Notice*:

[M]edia ownership rules must be reassessed on an ongoing basis to ensure that they are grounded in the current realities of the media marketplace. It is only through this reevaluation that the Commission can be assured that its media ownership rules actually advance, rather than undermine, our policy goals. In this regard, we recognize that the marketplace has changed dramatically over the last few decades, with both greater competition and diversity, and increasing consolidation.¹⁰⁸

Mediacom believes, therefore, that in making its decision regarding the Broadcast Cap (as well as other ownership restrictions), the Commission should consider the impact on cable system operators like Mediacom and the other ACA members and on the relevant public policy goals, including the promotion of competition, diversity and localism.

As already noted, the 1992 Cable Act was adopted largely because Congress feared that cable companies would use their alleged market power in ways that would be contrary

¹⁰⁸ *Notice*, ¶ 4, 17 F.C.C.R. 18503.

to the public interest. To a large degree, that fear was fed by the companies that owned or produced broadcast or cable programming. It is ironic that, today, the Big Six are engaging in exactly the kinds of abuses of power that concerned Congress in 1992.

For example, one concern behind the adoption of the 1992 Cable Act was ensuring that ownership of distribution did not result in the power to control the programming available to consumers.¹⁰⁹ To a large extent, it is the Big Six who now control the choice of basic programming to be distributed over cable systems through their practices of (i) tying carriage of their popular cable networks or retransmission consents for their O&O Stations to distribution of all or most of their other cable services, (ii) dictating tier placement, (iii) refusing to permit a la carte carriage and (iv) locking cable companies into long-term contracts that prohibit deletion even if ratings decline.

Congress adopted Sections 616 and 628 of the 1992 Cable Act to ensure consumer access to diverse kinds and sources of programming and to protect the ability of programmers to compete by preventing cable operators from engaging in certain forms of coercive, retaliatory and discriminatory practices in dealing with programmers. Today, it is the Big Six that have reduced the diversity of programming sources by gobbling up channel space through their tying practices so that there is little room for networks other than those they control. It is also the Big Six who use their vast market power to coerce Mediacom and other cable companies to carry networks their customers do not want and impose one-sided and unfair affiliation agreement terms; who retaliate if a cable operator dares to drop or consider dropping an unpopular or expensive network; and who discriminate in pricing and other terms against small market cable operators.

Another concern was to protect the viability of broadcast television, which was thought to be in danger from cable.¹¹⁰ One perceived danger was that cable companies would jeopardize the tradition of free availability of local broadcast stations to everyone by

¹⁰⁹ Goodale, *supra* note 103, at 1-28.

extorting payments as a condition for distribution over cable systems or simply refusing carriage for whatever reason. The 1992 Cable Act, therefore, reintroduced must-carry obligations and also gave broadcast stations the right to choose retransmission consent rather than must-carry. Today, it is the vertically integrated owners of the O&O Stations and other large station groups that use their market power and the must-carry/retransmission consent provisions of the 1992 Cable Act to extract distribution of and monthly payments for affiliated cable networks and other concessions from cable operators, and who threaten to withhold consent to carriage of not only local broadcast signals, but also popular or valuable cable networks unless their demands are met.

Today, on the video side of their businesses, many cable companies have almost been reduced to the status of serving the Big Six as pipelines for forced distribution of content selected by the programmers and as agents for collecting money from subscribers and passing it along to the programmers. Actually, when it comes to the money, cable companies are worse off than collection agencies. Constrained by competition from DBS and hit with double-digit price increases that cannot be entirely passed through to subscribers, video programming margins are shrinking and so cable companies are, in effect, required to reach into their own pockets to supplement the money passed through from subscribers.

The record in this proceeding already contains numerous comments that relate the history of the Broadcast Cap, analyze the decision in *Fox Televisions Stations v. FCC*¹¹⁰ and other recent cases relating to ownership limits, express opinions on the requirements of that decision in terms of what the Commission must consider and how it must proceed in its review and decision in this matter. No useful purpose would be served in having us regurgitate everything that many others have said many times. Mediacom submits, however, that in reaching its decision on the Broadcast Cap, the Commission should

¹¹⁰ *Id.*

¹¹¹ 280 F.3d 1027 (D.C. Cir. 2002).

carefully consider the impact of its choice on the issues of localism, diversity of voices and competition within the market for the distribution of multi-channel video programming, as well as some other important national policies relevant to that market.

In adopting the Communications Act of 1934, Congress stated that its objective was “to make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges.”¹¹² That objective implies the goal of encouraging a marketplace in which everyone, without distinction among geographic areas or market size, has access to diverse sources of programming and advanced services.¹¹³ Indeed, the 1996 Telecommunications Act calls upon the Commission to “encourage the deployment on a reasonable and timely basis advanced telecommunications capability to all Americans.”¹¹⁴ We believe, therefore, that in evaluating its options with respect to the Broadcast Cap, the Commission should consider the impact of each choice on the bridging of the digital divide between rural and small markets and the large urban centers with regard to the deployment of broadband digital services, Internet access and other new technologies.

In adopting and implementing national communications law, Congress and the Commission have long given special attention to underserved rural areas and assuring the universal availability of high quality services. For example, the 1992 Cable Act directed the Commission to adopt rules limiting horizontal concentration in the cable industry, but expressly directed it not to impose limitations “which would bar cable operators from serving previously unserved rural areas” and “which would impair the development of diverse and high-quality video programming.”¹¹⁵ At the same time, promotion of

¹¹² 47 U.S.C. § 151.

¹¹³ Goodale, *supra* note 103, at 1-26.

¹¹⁴ 47 U.S.C. § 706(a).

¹¹⁵ 47 U.S.C. § 533(f)(2)(F) & (G). For other examples, see 47 USC § 543(m) (additional rate regulation relief for small companies); *Implementation of Sections of the Cable Television Consumer Protection Act of 1992, Rate Regulation, Sixth Report and Order*

competition forms the core of many of the provisions of the 1984 Cable Act, the 1992 Cable Act, the 1996 Telecommunications Act, and hundreds of Commission decisions implementing those statutes. There is, obviously, an inherent tension between the goal of encouraging competition and the goals of preserving localism and protecting small service providers and consumers in rural and small markets from some of the consequences of competition. Mediacom believes that in pursuing the goal of promoting competition, the Commission should recognize that smaller markets and smaller market providers face special circumstances and should be considered separately from large markets and large market providers.

The practices of programmers described in Part II of these comments have affected the ability of ACA members to compete with the two national satellite companies, which enjoy lower programming rates and are not subject to some or all of the restrictions and requirements that are imposed by programmers on cable companies.

The Commission has acknowledged that one of the principal challenges facing the small cable sector is high programming costs.¹¹⁶ It has also noted that for cable networks with affiliate fees based on subscriber volume, only well clustered, large MSOs can take full advantage of programming discounts.¹¹⁷

Many small system operators are being squeezed on both the cost and revenue sides of their income statements. They pay more for programming because they do not have sufficient subscribers to qualify for the volume discounts and launch support enjoyed by the biggest MSOs or the two national DBS providers. Moreover, as explained in the ACA's opposition to last year's proposed merger of EchoStar and DirecTV, a rural cable system

and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, ¶ 25 (1995) (“*Small System Order*”).

¹¹⁶ Id. at ¶¶ 17, 56.

¹¹⁷ *In the matter of Annual Assessment of the Status of Competition in the market for the delivery of Video Programming, Sixth Annual Report*, CS Docket No. 99-230, n. 52 (Rel.

may pass only around 30 households each mile, compared with 150 or more households in an urban area.¹¹⁸ While the household density is greater in the small cities, it does not match the density of the large metropolitan areas. As a result, while the cost of building or upgrading a mile of cable plant may be the same or more for a rural or other small-market system as for a big city system, the potential cash flow per mile is much lower. Small system operators, therefore, will have fewer dollars remaining after capital expenditures to cover other costs.

On the revenue side, companies focused primarily on smaller markets simply cannot charge the same rates as the big MSOs who serve the largest DMAs. Mediacom's customers in Albany, Georgia, Clear Lake, Iowa, Moline, Illinois, Springfield, Missouri, Nogales, Arizona, and the other communities Mediacom serves do not have discretionary incomes that match those of subscribers in the larger metropolitan areas, and they cannot easily afford the rate increases that would have to be instituted if programming costs, especially for sports, continue to grow as they have during the past several years and if new costs are incurred as broadcasters continue to tie retransmission consent to launch of new cable networks for which affiliate fees must be paid and cable networks keep requiring launches of their new networks as a condition to maintaining distribution of their popular networks.

In addition, small market operators do not have the same capacity to earn revenues from the sale of ad avails because of the relatively small sizes of their markets. In fact, the ACA estimates that in order to just break even from selling advertising, a cable system needs at least 5,000 subscribers.¹¹⁹ Advertisers' willingness to purchase spots from a cable system, as well as the price they are willing to pay for those spots, may be greater for large MSOs because of the size of the audiences that can be reached and the geographic locations

Jan. 14, 2000) ("*Sixth Annual Report*") (referring specifically to sports programming).
See also R. Thomas Umstead, *Consolidation Blues*, Cablevision, June 28, 1999, at 39.

¹¹⁸ Jennifer Lee, *Small Cable Operators Worry About Life After Big Mergers*, The New York Times, Dec. 26, 2001 at C1.

and demographics of those audiences. Large MSOs and the national DBS companies attract more advertisers and advertisers who are willing to pay more; therefore, even if, as is most definitely not the case, a large MSO or DBS company paid the same affiliation fee for a particular network and received the same number of advertising spots on that network, its net cost is lower because it is able to offset more of its programming costs through advertising sales.¹²⁰ To some degree, because of the sheer number of their subscribers and their market demographics, the largest MSOs may become alternatives to advertisers' purchase of ad time directly from the cable networks, resulting in revenue loss for the networks. This, too, may give the networks an incentive to increase fees charged to smaller operators to make up for lost advertising revenues.

Some programmers offer marketing support to large MSOs and DBS companies, including "media buys" in which the programmer will pay cash or provide other incentives for carriage of promotional spots for the programmer in local markets. Marketing support is usually not offered at the same levels or at all to small system cable operators because they do not have sufficient number of subscribers or to justify marketing efforts of these kinds or the costs associated with producing and inserting the spots in the local programming is too high. Even if ad avails or marketing support are provided, cable companies serving small markets may not be able to take advantage of it because those markets do not have sufficient

¹¹⁹ *GAO Report, supra* at note 48.

¹²⁰ An article in the May 6, 2002 edition of *Multichannel News* article reported that ESPN, Inc., which is publicly reported to charge cable companies at least \$2 per subscriber per month for the ESPN network, believes that the "real cost" is under \$1 per subscriber, among other things because of the advertising revenues cable companies purportedly generate from ad avails on the network. Actually, ESPN's ratings have declined relative to five years ago and advertising time on ESPN is not as much in demand as it once was—a fact that ESPN surely knows since its own advertising revenues have been declining. Mediacom can assure you that it does not earn anything approaching \$1.00 per subscriber from the sale of advertising for its spots on ESPN. Mediacom believes, however, that ESPN made the statement because it, as is its tendency, considered only the biggest MSOs and the national DBS companies, who earn more from their ad avails because of their size and the demographics of their markets. R. Thomas Umstead, *Yes Sues, While ESPN Hikes Fees*, *Multichannel News*, May 6, 2002.

local media outlets or the media serving larger regions are too expensive relative to the levels of support received from programmers.

Smaller market cable systems are already facing intense competitive pressure from EchoStar and DirecTV, resulting in the loss of substantial market share.¹²¹ DBS companies have an overwhelming structural cost advantage over smaller market cable systems. Programmers charge ACA members more than the DBS companies, even though the related costs are not appreciably, if at all, greater. Local cable companies cannot realistically be expected to provide effective competition if the DBS companies can always undercut the cable prices because their programming costs are lower and they do not pay property taxes and franchise fees. As a direct result, the subscriber loss reported by ACA members has accelerated, running in certain systems at the annual rate of 15% to 25%.¹²² With the higher cost structures inherent in operating rural and small market systems, the resulting loss of revenues has threatened the viability of hundreds of small systems.¹²³

While Mediacom remains one of the most financially sound companies in the industry and is not in danger of going out of business, high and rapidly growing programming costs mean that the rates Mediacom charges subscribers have to increase more, and more often, than otherwise would be necessary and also result in the transfer to programmers of funds that otherwise could be used for further service additions and enhancements or for acquiring and upgrading other neglected systems in other small communities.

The situation is much different for other independent cable companies, many of which are being crushed by soaring programming costs and loss of subscribers to DBS. Some members of the ACA have already been driven out of business, and unless things change dramatically—and quickly—many more are expected to follow. A recent report by

¹²¹ *ACA Petition*, *supra* note 3, at 21.

¹²² *Id.*

¹²³ *Id.*

Credit Suisse First Boston states that many local cable systems, primarily in rural areas, could be forced to discontinue operations by 2006 as a result of increased DBS subscribership and increased costs.¹²⁴ Many rural operators have sold out in the last several years. Independent Brokerage, a Denver company that focuses on selling rural cable companies, saw the number of clients trying to sell their cable systems double in 2001 as compared to the prior year.¹²⁵ Selling isolated small market systems is problematic at best, since the only buyers whose programming discounts match or exceed those of the DBS companies are the large MSOs, most of whom long ago shifted their strategic focus to the large markets. Chapter 11 filings were made in 2001 by three of the most significant smaller market cable companies that collectively operated at least 790 separate rural cable systems serving almost 500,000 subscribers.¹²⁶ The principal factors in the sales and insolvencies have been subscriber loss to DBS and increased programming costs. Hundreds of other small system operators are believed to face similar circumstances.

To a large degree, programmers are insulated against the revenue losses if small cable systems lose subscribers. Subscribers no longer receiving service from the cable company still want to watch television and simply move to DBS, and the programmer gets paid whether an individual subscribes to cable or DBS. If small systems go out of business, there will be no effective competitor to DBS within the markets served by those systems. The results for consumers would be higher prices, fewer choices and reduced services.

Localism would also be adversely affected. Unlike cable companies, the two DBS companies do not have local offices or management in the communities they serve and,

¹²⁴ Ty P. Carmichael, Jr., *Natural Selection, DBS Should Thrive as the Fittest to Serve Rural America*, Credit Suisse First Boston Report, Oct. 12, 2001, at 11-14.

¹²⁵ Jennifer Lee, *Small Cable Operators Worry About Life After Big Mergers*, The New York Times, Dec. 26, 2001, at C1.

¹²⁶ *Cable Notes*, Warren's Cable Regulation Monitor, 2001 WL 8146945 (Nov. 19, 2001) (Classic Communications files for Chapter 11); *Bondholders OK Galaxy Plan*, Multichannel News (Oct. 1, 2001) (Galaxy Telecom Inc. files for Chapter 11); *Firm Seeks Chapter 11 Protection*, Telegram & Gazette Worcester, MA, 2001 WL 6231026 (Jan. 11, 2001) (Cooney Cable Associates, Inc.).

because of the limitations of their technology, do not have the same flexibility as cable companies in tailoring different programming choices for different localities. If local cable companies are purchased by larger MSOs, local staff may be cut or consolidated and local systems may be required to carry a more homogenized mix of networks.

Moreover, the digital divide, which local cable systems have successfully been closing in many communities by launching and rolling out high-speed Internet access, VOD and telephone services, may widen, causing citizens in rural areas and small towns to be deprived of the benefits of advanced broadband services. If small system operators disappear, the result will also be the elimination of a competitor to telephone companies providing Internet access and telephone services in the market and the delay or potentially the unavailability of VOD or other interactive services. As noted, DBS companies currently cannot match the high-speed Internet access and VOD services of local cable companies.

Some of the programmers' practices also severely impede competition and limit diversity within the market for the production and delivery of cable programming. The practices of the sports and other powerful networks hurt the ability of independent or less powerful networks to gain distribution. Other comments filed in this proceeding report that:

Of the 39 new networks identified by the cable commenters that have been created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these networks have ownership by the top four programmers. Eight involve other MSOs and 6 involve other TV broadcasters. These numbers contradict the claim that there has been a dramatic change in the programming environment. . . . The number of independent networks as a percentage of the total has remained about the same, as has the number of subscribers to independent networks.¹²⁷

There is a real-world limit on the ability of a cable operator to increase monthly subscriber charges to reflect increased costs. This is particularly true in smaller or non-urban markets, where the discretionary income of subscribers for entertainment purchases is smaller. If the popular networks are priced, as they are, at significantly above the operator's average per-channel cost, and if the rate of annual increases exceed, as they do, the annual rate at which the operator can increase its subscriber charges, then an obvious way for the operator to prevent shrinking margins is to drop, or choose not to launch, less popular networks.

In addition, the practice of programmers which offer multiple networks of “tying” a cable operator’s carriage of one network to its carriage of another reduces the number of channels available for other networks. In virtually all cable systems, the number of channels set aside for carriage of basic cable networks is less than the number of those networks that are available.¹²⁸ Some networks simply will not be carried on the basic/expanded basic tier (or at all) in any given system. The goal for any programmer is to be one of the networks selected for carriage. One perfectly legitimate way of enhancing the prospects for selection is to produce a popular service that is demanded by subscribers. Another is to set the affiliate fees for the network so that they are more attractive than those charged by other networks. Frequently, programmers resort to less legitimate methods of obtaining carriage. As discussed above, one such method is to “tie” granting permission to carry a popular network to the operator’s commitment to also carry weaker networks owned by the programmer. The Big Six already own or have equity interests in approximately 153 cable networks which account for over 90% of a cable operators total programming cost. Their practice of “bundling” networks and penalizing operators who do not carry all of them on the most widely distributed tier means that there is less available channel capacity for independent networks.

As the Commission recognizes in the *Notice*, localism means more than just locally originated programming. It includes all programming choices that a television station makes based on its judgment as to whether a particular program will meet the needs and preferences of the local community. True localism means that programming decisions will vary among communities. Cable operators have lost much or all control over the selection

¹²⁷ Comments of Consumer Federation of America *et al.* at 218.

¹²⁸ In non-upgraded systems of 550 MHz or below, this limitation may result from the lack of sufficient bandwidth. Even in upgraded systems that are not “channel locked,” however, there is an economic limit on the number of channels offered in the expanded basic tier because the license fees for the included channels have to be recovered from subscribers, who simply would not be willing to pay the monthly fee that would have to be charged if the expanded basic tier included all or substantially all of the available cable networks.

of programming services for their local cable systems because of the bundling practices of the Big Six, their dictates as to tier placement and their insistence on long-term contracts with no-delete clauses. Programming to meet the tastes and needs of community viewers is the very essence of localism. The cable networks owned by the Big Six are national in scope and they skew their programming to the tastes of the large urban areas, with little regard for the interests of citizens in small and rural communities.

As described in Part II of these comments, one direct result of media concentration and the market power and practices of some cable networks has been sharply higher prices paid by cable companies for programming. The rates for many of the popular networks are not only high, but increase annually at rates considerably in excess of inflation. The portion of programming costs that Mediacom and ACA members cannot prudently absorb must be passed on to subscribers, but consumers in small markets generally have more limited means than urban residents.

Many programmers adamantly refuse to allow “a la carte” pricing so that cable subscribers can decide for themselves whether a particular high-cost network is worth the price. They insist on carriage of many of their networks on the most widely penetrated service tier above basic and charge a fee for each subscriber, including those who do not want the network or would not pay for it separately if given the choice. Many programmers, however, refuse to give them a choice. The result is higher bills for all cable customers and annual increases in excess of inflation rates.

Moreover, price discrimination at both the wholesale and retail levels results from programmers’ charging lower net effective prices to some MVPD companies than to others. The favored purchasers include the nation's largest MSOs and the two principal DBS companies, while the disfavored purchasers include the smaller MSOs and virtually all of the nation's independent cable television system operators. The result is that businesses at the same functional level do not stand on equal competitive footing so far as price is

concerned.¹²⁹ As previously noted, one consequence is to prevent the cable operator from effectively competing against the DBS companies.

Mediacom believes that consumers in one town, city or state should not pay a different price for a cable network than consumers in another town, city or state where the difference is not cost-based.¹³⁰ Programmers' practices relating to volume discount and launch and marketing support result in price discrimination against consumers in rural areas and small towns and cities. The biggest volume discounts are given to the giant MSOs that primarily serve the large cities. They also receive launch and marketing support that often is not available to ACA members. Programmers recoup those concessions by charging higher prices to the smaller cable companies serving rural and small communities, even though the programmers' costs of delivering their networks to customers in those markets are not any greater than their costs of delivering the networks to the big cities. Once programming is produced and sent to the satellite for distribution, it costs no more to deliver it to a cable operator with 1,000 subscribers than to an MSO with 10 million subscribers.

Proponents of elimination or relaxation of the Broadcast Cap believe that market forces can safely be relied upon to ensure competitive media markets and to guarantee diversity and localism. The joint filing of Fox Entertainment Group, Inc., Fox Television Stations, Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc. and Viacom in this proceeding states that "there is no longer any public interest need served by the Commission's media ownership rules" and argues that a "properly functioning

¹²⁹ This is the fundamental principle underlying the Robinson-Patman Act. *See* *Boise Cascade Corp.*, 107 F.T.C. at 205, quoting *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

¹³⁰ It is possible that a programmer saves some expense when it deals with a larger company because it needs to negotiate with only one entity to secure a given number of subscribers as opposed to hundreds of negotiations with smaller operators. The reality is, however, that the programmers have never bothered to negotiate with the small, independent operators. They simply deal with the NCTC or offer their rate card prices and standard terms to the smaller operators on a take-it-or-leave-it basis, knowing that

market,” combined with application of the antitrust laws, can safely be relied upon to ensure diverse and competitive media markets.¹³¹ Indeed, the joint comments suggest that even the “properly functioning market” is not necessary, since at one point it is stated that “application of the antitrust rules alone is sufficient to serve the Commission’s competition goal (as well as all other policy goals the Commission seeks to serve).”¹³²

Unfortunately, in ways discussed at length in Part II of these comments, the market for cable programming does not seem to function properly. Many other commentators in this proceeding have cited other reasons for lack of confidence in the ability of the market to ensure competition, diversity and localism.¹³³ Mediacom also has a much different view of the efficacy of the antitrust laws to prevent the practices that it believes are an abuse of market power. There is no case that definitively addresses the applicability of the Sherman Act and the Clayton Act to those practices and, as already noted, the media conglomerates can afford to hire the best lawyers and are careful to avoid clear and overt violations of the antitrust laws. In any event, suing one of the Big Six, with their billions in revenues to fund litigation expenses, under the Sherman Act or the Clayton Act is not a viable option for the average ACA member. The Robinson-Patman Act¹³⁴ prohibits certain forms of price discrimination in the sale of “commodities,” but courts addressing the issue of whether cable television programming or distribution can properly be considered a commodity have universally found them to be a service and not a commodity.¹³⁵

most smaller operators have little choice but to “take it,” particularly in the case of the most popular networks.

¹³¹ Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.; and Viacom (Jan. 2, 2003) at 13, 20.

¹³² *Id.* at 20.

¹³³ See, e.g., Comments of Consumer Federation of America *et al.* & Cox Comments.

¹³⁴ 15 U.S.C. § 13(a)-(f).

¹³⁵ See, e.g., Gall v. Home Box Office, Inc., 1992 WL 230245, *3 (S.D.N.Y. 1992) (identifying uniform body of law on the issue and determining that “cable television programming is a service rather than a commodity” where subscriber attempted to bring price discrimination claim against cable programmer); TV Comm. Network, Inc. v.

Similarly, no effective protection is available under the rules adopted by the Commission, under the mandate of the 1992 Cable Act, to govern the conduct of vertically integrated video programmers, including regulations prohibiting “discrimination . . . in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributions, or their agents or buying groups.”¹³⁶ An important purpose of the program access rules is to prevent a vertically integrated cable programmer from discriminating against independent operators by offering its affiliated cable operator better rates.¹³⁷

The rules have not served to prevent price discrimination against small market system owners described in these comments. First of all, not all of the six media conglomerates are vertically integrated with a cable company. Moreover, the rules expressly permit volume discounts, as long as they are applied uniformly. The result is that so-called “nondiscriminatory” pricing in reality discriminates in favor of large operators against small operators because it is the largest MSOs that receive the benefits of the largest volume discounts, even if uniformly applied. Moreover, it is the largest MSOs which are

ESPN, Inc., 767 F. Supp. 1062, 1076 (D.Colo.1991), aff’d, 964 F.2d 1022 (10th Cir.1992) (when considering claim brought by cable supplier against cable television networks and operators, court determined that “cable television is not a commodity; it is a service”).

¹³⁶ 47 U.S.C. §548(c)(2)(B).

¹³⁷ The rules do not seem to take into account the possibility that a vertically integrated programmer might actually profit from charging its affiliated operator a higher, rather than a lower rate. The reason is that the higher rates paid stay within the consolidated group consisting of the programmer and the affiliated cable company. From the perspective of the consolidated entity, affiliate fees are simply taken from one of the company’s pockets and put into its other pocket. Higher affiliate fees, therefore, result in no real cost to the consolidated company. Since the vertically integrated networks tend to be owned by the largest cable companies, who also receive MFN protection, the affiliate fees paid by those cable companies become the floor for the fees paid by independent cable companies. Volume discounts mean that smaller operators will pay rates higher than the rates paid by the large cable companies that own the networks; therefore, the higher the rates paid by the cable company that owns a programmer, the more the consolidated entity will earn from all of the other cable operators.

vertically integrated, meaning that the rules permit vertically integrated programmers to give the lowest prices to their affiliated MSOs.

In addition, compliance with the rules is generally determined by reference to the programmer's standard "rate card" and programmers long ago became adept at insuring that their published rate cards do not violate the nondiscriminatory pricing provisions of the program access rules. In the case of many networks, however, the reality is that nobody under contract pays rate card prices, and because programmers refuse to share information about contract terms and impose confidentiality agreements on cable companies, it is impossible to determine whether or not violations of the program access rules occur.

While the program access rules have not yet been effectively applied in the past to prevent the kinds of market behavior discussed in Part II, Mediacom is considering filing, both in its own right and on behalf of its subsidiaries that are members of the NCTC, one or more formal petitions requesting that the Commission investigate some specific cases in which Mediacom believes those rules have been violated.

We regret to say that the policies and actions of Congress and the Commission have contributed to the state of affairs we describe. Past liberalization of the various media ownership rules has contributed to the growth of media giants that control the most popular broadcast and cable programming and wield tremendous market power that simply cannot be matched by Mediacom, let alone the other, much smaller members of the ACA. In addition, legislation and rules intended to foster development of DBS companies as effective competitors have succeeded and those companies now possess far greater resources and market power than ACA members, who now find themselves operating in a landscape totally dominated by six huge media conglomerates, one or two giant MSOs and the two national DBS companies.

If history is any guide, relaxation of the television local ownership rules can be expected to increase concentration in the local television marketplace and to increase the

market power of the media conglomerates that are the most likely buyers. Following the adoption of the Telecommunications Act of 1996, the Commission took steps to relax several of its ownership and cross-ownership rules. The result of the 1996 Act, including the consequent relaxation of the Commission's rules, was to permit and encourage the growth of the present-day mass media giants.¹³⁸ The broadcast networks' vertical integration and reach into other media platforms have accelerated since the national television ownership cap was raised from 25 to 35 percent in 1996. Disney merged with ABC in 1996; Viacom acquired CBS in 2000; and Fox merged with Chris-Craft Industries in 2001. The holdings of the largest television and radio owners have grown tremendously since the adoption of the Telecommunications Act of 1996.¹³⁹ In addition, in the DBS industry, DirecTV merged with U.S. Satellite Broadcasting and acquired Primestar's assets, and EchoStar acquired News Corporation's American Sky Broadcasting, reducing the number of DBS companies to only two. There was also significant consolidation in the telephone industry.¹⁴⁰ The following are some of the transactions of the size of \$1 billion or more that have occurred:

- AT&T, the largest domestic and international long distance telecommunications carrier, merged with TCI, the largest provider of cable television service. The Commission relaxed its horizontal restriction on ownership of cable systems from 30% of homes passed to 30% of subscribers served, which permitted the merger to proceed without divestitures.¹⁴¹
- AT&T acquired MediaOne and Cablevision systems in Boston
- Cox acquired Prime Cable Las Vegas

¹³⁸ Goodale, *supra* note 103, at 1-38.

¹³⁹ Around the time of enactment of the 1996 Telecommunications Act, the number of owners of commercial radio declined by 25%, from 5,100 to approximately 3,800, while the number of entities owning commercial TV stations fell by about 34%, from 543 to 360. *In the matter of Cross-Ownership of Broadcast Stations and Newspapers—Newspaper/Radio Cross-Ownership Waiver Policy*, Order and Notice of Proposed Rule Making, FCC 01-262, ¶ 13, (rel. Sept. 13, 2001).

¹⁴⁰ Goodale, *supra* note 103, at 1-49, note 52.

¹⁴¹ *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, Third Report and Order*, 14 F.C.C. Rcd. 19098 (1999).

- Comcast acquired Prime Cable Maryland and Chicago
- Paul Allen acquired Charter Communications and Marcus Cable
- Adelphia acquired FrontierVision and Century Communications
- Viacom purchased BET Holdings, including BET cable network
- Clear Channel acquired Jacor Communications, which made it the second largest radio group with more than 450 stations, and the number-one radio group AMFM Inc. was merged into Clear Channel
- Vivendi in 2002 invested \$1.5 billion in EchoStar in exchange for carriage of five Vivendi owned channels
- AOL merged with Time Warner Inc.
- Comcast acquired AT&T Broadband

IV. CONCLUSION

Simply put, competition has not resulted in the need to relax, much less eliminate, the Commission's ownership rules and has not proved to be an adequate substitute for structural regulation. Indeed, in Mediacom's opinion, prior elimination or relaxation of structural regulations has in every instance been followed by more concentration of market power and more applications of that power to the detriment of independent cable companies, consumers and independent producers of programming. While Mediacom and its customers in the 1,500 communities it serves have certainly been hurt by the developments and practices described in these comments, Mediacom is in good financial health and it expects to retain its independence, improve and expand its services, continue to provide jobs and make other contributions to local and state economies and produce even more value for its customers and stockholders. The harm to Mediacom and its subscribers has principally been the erosion of local control of programming choices, the shrinkage of diversity of programming sources and the transfer of millions of dollars to programmers as a result of discriminatory pricing that could have been better spent to hold down subscriber rate

increases, improve services and acquire and upgrade other neglected cable systems in order to bring the citizens of the communities they serve the same improvements we have brought to our existing franchise areas.

The other members of the ACA have experienced the same effects of the incredible concentration of the media industry as Mediacom. Some of them, however, may be in far more precarious financial circumstances. If a significant number of small, independent cable companies close their doors or sell their systems to the biggest MSOs, the harm to the public interest and the goals of competition, diversity and localism will suffer even more.

As the Commission recognizes in the *Notice*, in assessing the impact of the different options for action on the Broadcast Cap, the Commission cannot ignore the fact that the broadcast networks are now owned by large media companies. Relaxing or eliminating the Broadcast Cap would undoubtedly lead to a flurry of acquisitions of even more local broadcast stations by some or all of the Big Six, thereby adding significantly to their already excessive market power. Each arm of each of the Big Six conglomerates adds to its overall strength, since their common strategy and practice is to leverage each of their properties to maximum advantage of the overall company. If relaxation of the Ownership Cap adds to the power of one of the Big Six in the broadcast television market, then that added clout will be applied in other areas. While the original concern of Congress and the Commission underlying the Broadcast Cap was that, absent some ownership restrictions, the national broadcast networks eventually would dominate the broadcast industry, today the Commission must be concerned that relaxation might not only result in that dominance, but also contribute to the power of the networks' owners in other spheres, including the market for cable programming.

If the Commission does see fit to eliminate or relax the Broadcast Cap, then Mediacom believes that it should condition the right of any of the Big Six to acquire new or additional broadcast stations upon its conformity with the following principles:

- The net effective rates for cable networks owned by affiliated companies should be the same for all MVPDs, regardless of distribution technology, size or market characteristics, unless the differentials are cost based.
- Cable systems should have the right to offer on an a la carte basis those networks for which the license fee is more than twice the average per-channel cost on the same tier of service.
- Broadcasters that are vertically integrated with owners of cable networks should be required to elect must-carry, rather than retransmission consent.
- Affiliated programmers should be prohibited from tying or bundling cable networks, either overtly or through pricing schemes that make individual carriage uneconomic.
- In the interest of assuring the availability of critical information that is essential to a “properly functioning market,” affiliated programmers should be required to stop using confidentiality provisions to protect disclosure of rates and terms, waive existing confidentiality clauses and disclose the net effective rates that the various MSOs and the DBS companies actually pay, as well as other material contract terms.

All of these requirements would serve the interests of the public policy goals of competition, diversity and localism and also further the goal of ensuring that all citizens, regardless of where they live, have access to video programming on a non-discriminatory basis. Mediacom also believes that imposing those conditions is within the authority of the Commission under Section 202 of the Telecommunications Act.

Mediacom appreciates the opportunity to express its views in this proceeding.

Respectfully submitted,

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